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CASES
IN
CONSTITUTIONAL LAW

VS. 

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CASES

IN

CONSTITUTIONAL LAW

BY

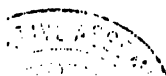
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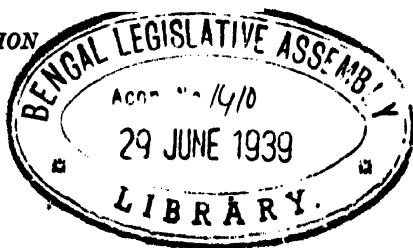
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SECOND EDITION
REVISED



OXFORD UNIVERSITY PRESS

LONDON: HUMPHREY MILFORD

First Edition 1928
Second Edition 1933

Reprinted photographically in Great Britain in 1938
by LOWE & BRYDONE, PRINTERS, LONDON.

Printed in Great Britain

PREFACE

THE teaching of constitutional law has long suffered from the lack of a modern case-book containing reports of judgements as they were actually delivered in the Courts. We have been encouraged by the success of the admirable collections of judgements which illustrate the law of contract and the law of torts to undertake the preparation of the present volume, which we hope will be of service not only to those interested in the study of the law, but also to students of constitutional history and of English political institutions.

The very general use of Dicey's *Law of the Constitution* by persons other than lawyers sufficiently shows that some knowledge of the legal principles on which the English constitution rests is recognized as essential to its true understanding. Such a knowledge can best be acquired by a study of leading cases in constitutional law; but the layman is not yet acquainted, as the lawyer is, with the need for studying those cases in their original form. The educational value to be derived from a study of the *ipsissima verba* of a great judge far outweighs the additional trouble involved in reading his judgement as it was actually delivered, rather than in a mere abridgement or summary of its contents. Such a judgement exhibits step by step the reasoning by which an able mind reaches its conclusion on some difficult point of law. Its force and interest are seriously diminished by any attempt to abbreviate or summarize the train of argument. We feel certain that all but a few of the most difficult cases included in this collection are well within the comprehension of the layman. But the advantage, both to lawyer and layman, of studying a complete report does not end here. Judgements on constitutional questions are often replete with historical learning, which it may not be easy to find elsewhere. The most abiding impression which a study of constitutional cases conveys is not, however, of historical change, but of the permanence of the Common Law. Not only do the leading principles of constitutional law go back to the remotest ages, but the same temper may be discerned in all the greater judges, from Coke, through Holt, Camden, and Blackburn to

the present occupants of the Bench; a temper peculiar to persons who have been bred in the Common Law and impregnated with the characteristic traditions of that English liberty which is best exemplified in the rules of the Common Law. Only the student who is prepared to read their judgements in the original form can fully appreciate the real genius of the constitution which they expound.

In comparison with cases, statutes have for the most part only a fleeting interest. They indeed regulate the constitution and powers of most of our public authorities, but the mode of exercise of those powers is in the main a matter of Common Law. Accordingly, we should not in any event have been disposed to include a large number of statutes in this volume; and such statutes as Magna Carta and the Bill of Rights, which still furnish a basis of constitutional principle, are already accessible to the student in other collections. Three modern statutes are however reprinted here. They appeared to us to deserve detailed study, and they are not, so far as we are aware, to be found outside the statute book.

In the belief that the value of a report is gravely impaired by abridgement, we have, wherever possible, printed in full at least one judgement in each case. But a strict adherence to this rule proved to be a counsel of perfection, and exigencies of space have compelled us to make certain omissions. Where this was necessary we have almost invariably inserted, in italics and within square brackets, a short précis of the omitted passage, which, it is hoped, will sufficiently indicate its importance in the general argument. In two cases only were we obliged to make a more drastic abridgement. The judgements in *Bushell's Case* and in *Entick v. Carrington* are so long and in places so difficult that our omissions could not be conveniently summarized, and are therefore marked by the insertion of dots. Another exception to our general rule will be found in the presence of some half-dozen extracts, illustrating special points of law discussed in judgements which did not appear to merit a full report. The statements of facts which precede the judgements have been treated with more latitude, and, where rewritten, have been enclosed within square brackets.

In our choice of cases, we have been largely influenced by the most recent developments in constitutional law. Topics

which engaged the attention of older writers on the constitution have now lost much of their significance. The immense extension of the sphere of administration, both by government departments and local authorities, which has marked the last half-century, compels the modern student to approach his subject with an outlook totally different from that of his predecessors. The growth of the activity of government departments to unforeseen dimensions has invested the law relating to remedies against the Crown and its servants with a more general interest. The increasing importance of subordinate legislation and of the exercise of discretionary authority by administrative bodies and public officials is only very imperfectly reflected in books ordinarily available to the student. These, though the most significant, are not the only lines of development in the modern constitution. The four years of war, followed by the rebellion in Ireland, have done much to elucidate questions connected with the powers of the Crown in time of war and insurrection, and particularly the obscure and difficult subject of martial law. Similarly, the rapid advance of the self-governing Dominions towards an equal partnership with the Mother Country in the 'British Commonwealth of Nations' makes every modern case which turns on their legal status worthy of special notice. The recognition that such problems as these, rather than villeinage, slavery, or the press-gang, are of real moment in the constitution of the present day, obliges the student to enlarge his horizon so as to include much that previously lay beyond it. We have endeavoured to meet his needs, and our standpoint, for which we feel no apology is necessary, is frankly modern.

It would, however, be impossible to defend the exclusion of several important cases of the seventeenth and eighteenth centuries. Apart from their value for the historian, of which we have endeavoured not to lose sight, such cases as *Bates's Case*, *Hampden's Case*, and *Ashby v. White*, cannot safely be neglected by the lawyer, who has to study doctrines of Prerogative and Privilege inherited from an era as important in the legal as in the constitutional history of England. But to include such cases in the form in which they are reported presents insuperable difficulties. Both judgements and arguments (which are often of equal interest and value) are prolix and obscure. These, with

more modern cases which raise interesting points of law and provided useful short extracts, have been embodied in the introductions which we have prefixed to the various sections of the book.

The task of writing these introductions was forced upon us by the need for some systematic exposition of the rules of law established in the cases to which they relate, and by the absence of any single work dealing with constitutional law on the lines we contemplated. They are not intended to be exhaustive or to provide in the aggregate a complete treatise on the law of the constitution, but are to be considered as a series of short essays on special topics, designed for use in conjunction with the more important secondary authorities ordinarily available to the student. It is hoped that they will compensate for the absence of head-notes, which we have always omitted as not being authoritative.

We have to thank the Incorporated Council of Law Reporting, the Incorporated Council of Law Reporting for Ireland, the proprietors of *The Times Law Reports*, and Messrs. J. C. Juta & Co., the proprietors of the *South African Law Reports*, for their courtesy in giving us permission to reprint cases from their respective series of reports.

Our gratitude is also due to many friends and colleagues in Oxford, who have at various times given us ungrudging assistance by reading and criticizing portions of our work. We owe a special debt to Mr. H. G. Hanbury, Fellow of Lincoln, who read the whole of the manuscript, and to Professor J. L. Brierly, and Mr. C. K. Allen, Fellow of University, for their unfailing interest and for many valuable suggestions. From the late Mr. E. M. Wrong of Magdalen we obtained much useful help in avoiding the difficulties which beset any attempt to describe the legal status of the Dominions. To these, and to many other friends, we would record our warm thanks.

The index and tables we owe in large part to the aid of Messrs. J. M. Mitchell and S. E. Naish of Corpus.

D. L. K.

F. H. L.

OXFORD,
31st July, 1928.

PREFACE TO THE SECOND EDITION

THE only new document included in this edition is the Statute of Westminster. Had we thought any of the more recent cases worthy of being printed in full, the exigencies of photographic reproduction would have made it impossible. We should, however, like to thank the Delegates of the Clarendon Press for allowing us very considerable latitude in altering the introductions. The introductions to the sections dealing with Judicial Control of Public Authorities and with the Overseas Dominions of the Crown have been almost completely rewritten. The other important alterations will be found on pp. 11-13, 220, 283-4. Elsewhere we have tried, as far as possible, to meet the criticisms of reviewers, for whose favourable notices, especially for that of Sir William Holdsworth appearing in the *Law Quarterly Review* for December 1928, we are very grateful. We have also to thank Professor H. A. Smith for kindly looking through the revised introduction to the Overseas Dominions of the Crown, and Dr. C. K. Allen for continuing the encouragement which first prompted us to undertake the preparation of this book.

Unfortunately all possible alterations to the introduction to the section dealing with Legislation had already been made before the appearance of the *Report of the Committee on Ministers' Powers* (1932, Cmd. 4060), and of Sir William Graham-Harrison's *Notes on the Delegation of Legislative Powers, &c.*, in the light of which we might otherwise have been inclined to modify the opinions we have expressed.

D. L. K.
F. H. L.

OXFORD,

16th November, 1932.

CONTENTS

TABLE OF CASES	xiv
TABLE OF STATUTES	xx
TABLE OF ABBREVIATIONS	xxvi

/ I. LEGISLATION

INTRODUCTION :

A. Sovereignty of Parliament	1
B. Subordinate Legislation	9

CASES :

Rex. v. Halliday. <i>Ex parte</i> Zadig	14
Chester v. Bateson	22
✓ Kruse v. Johnson ✓	26

/ II. PREROGATIVE

INTRODUCTION	31
------------------------	----

Bates's Case	36
/ Darnel's, or the Five Knights' Case	37
✓ R. v. Hampden (the Case of Ship-money)	39
Godden v. Hales	55

CASES :

The Case of Proclamations	63
The Zamora (<i>Extract</i>)	66

/ III. PARLIAMENTARY PRIVILEGE

INTRODUCTION	71
------------------------	----

CASES :

Stockdale v. Hansard	78
The Case of the Sheriff of Middlesex	92
✓ Bradlaugh v. Gossett	96
Wason v. Walter	105

IV. TAXATION

INTRODUCTION	117
------------------------	-----

CASE :

A.-G. v. Wilts United Dairies	119
---	-----

CONTENTS

xi

V. JUDICIAL CONTROL OF PUBLIC AUTHORITIES

INTRODUCTION	124
------------------------	-----

CASES :

✓ <i>Entick v. Carrington</i>	145
Metropolitan Asylum District <i>v. Hill</i> (<i>Extract</i>)	154
The Mersey Docks and Harbour Board <i>v. Gibbs</i>	156
Anderson <i>v. Gorrie</i>	168
Bushell's Case	170
Secretary of State for Home Affairs <i>v. O'Brien</i>	178
Ferguson <i>v. Earl of Kinnoul</i> (<i>Extract</i>)	185
R. <i>v. Electricity Commissioners</i>	187
Reg. <i>v. Rand</i>	193
Cooper <i>v. Wandsworth Board of Works</i>	194
Reg. <i>v. Boteler</i>	198
L.G.B. <i>v. Arlidge</i>	199
Royal Aquarium, &c., <i>v. Parkinson</i>	207
The Case of the Marshalsea (<i>Extract</i>)	212

STATUTE :

✓ <i>Public Authorities Protection Act, 1893</i>	213
--	-----

VI. REMEDIES AGAINST THE CROWN AND ITS SERVANTS

INTRODUCTION	215
------------------------	-----

STATUTE :

Petitions of Right Act, 1860	229
--	-----

CASES :

✓ <i>Thomas v. The Queen</i>	231
Dunn <i>v. The Queen</i>	241
Rederiaktiebolaget 'Amphitrite' <i>v. The King</i>	242
Viscount Canterbury <i>v. Attorney-General</i>	244
Raleigh <i>v. Goschen</i> (<i>Extract</i>)	250
✓ <i>Bainbridge v. Postmaster-General</i>	252
Macbeath <i>v. Haldimand</i> ✓	260
Gidley <i>v. Lord Palmerston</i>	262
Dyson <i>v. Attorney-General</i>	265

VII. THE CROWN AND JUSTICE

INTRODUCTION	271
------------------------	-----

CASES :

Reg. <i>v. Allen</i>	274
Prohibitions del Roy	276
✓ <i>In re Lord Bishop of Natal</i>	278

VIII. ALLEGIANCE

INTRODUCTION	283
------------------------	-----

CASES :

✓ R. v. Lynch	290
✓ De Jager v. Attorney-General of Natal	292

IX. THE CROWN AND FOREIGN AFFAIRS

INTRODUCTION :

✓ A. Acts of State	295
✓ B. Treaties	298
✓ C. Recognition of Foreign Sovereigns	302

CASES :

Secretary of State for India v. Sahaba	304
✓ Walker v. Baird	310
✓ Johnstone v. Pedlar	312
Duff Development Co. v. Kelantan Government	316

X. THE POWERS OF THE CROWN IN TIME OF WAR

INTRODUCTION	323
------------------------	-----

CASES :

✓ The Case of the King's Prerogative in Saltpetre (<i>Extract</i>)	325
✓ Attorney-General v. De Keyser's Royal Hotel	325

XI. MILITARY LAW, THE MAINTENANCE OF ORDER,
AND MARTIAL LAW

GENERAL INTRODUCTION	335
--------------------------------	-----

A. MILITARY LAW

INTRODUCTION	336
------------------------	-----

CASES :

Dawkins v. Lord F. Paulet	341
✓ Reg. v. Smith	348

B. THE MAINTENANCE OF ORDER

INTRODUCTION	352
------------------------	-----

CASES:

✓ Beatty v. Gillbanks	354
✓ Wise v. Dunning	357
Charge to the Bristol Grand Jury	359
Rex v. Pinney (<i>Extract</i>)	363
Reg. v. Brown	364

CONTENTS

xiii

STATUTE:

✓ <u>Emergency Powers Act, 1920</u> ^R	365
--	-----

C. MARTIAL LAW

INTRODUCTION	368
--------------	-----

CASES:

Opinion of Campbell and Rolfe, 1838	382
<i>Ex parte</i> Marais	383
<i>Rex v. Allen</i>	389
Clifford and O'Sullivan	398
Higgins v. Willis	404

XII. THE OVERSEAS DOMINIONS OF THE CROWN

INTRODUCTION:

A. Classification	405
B. The Powers of a Colonial Legislature	411
C. Constitutional Amendment	416
D. The Crown and its Representatives Overseas	421

CASES:

Campbell v. Hall	425
Phillips v. Eyre	431
✓ <i>Nadan v. The King</i>	442
Attorney-General for Ontario v. Attorney-General for Canada	449
The Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick	458
✓ <i>Musgrave v. Pulido</i>	462

STATUTE:

✓ <u>Statute of Westminster, 1931</u> ^R	471
--	-----

INDEX	475
-------	-----

TABLE OF CASES

Cases reported in full are shown *in italics*. The page at which the report is printed is shown in heavy type.

A

- Adam, *In re*, 314.
 Admiralty Commissioners v. S.S. Amerika, 223 n.
 Akkeradyk's Case, 212.
 Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co., 303.
 Allen, *In re*, 339.
 ✓ Anderson v. Gorrie, 126, 168.
 Aroot, Nabob of, v. E. India Co., 306.
 Arms, The Case of, 360.
 Arnold v. The King-Emperor, 448.
 ✓ Ashby v. White, 72, 76, 87.
 Asiatic Petroleum Co. v. Anglo-Persian Oil Co., 217 n.
 Astley v. Younge, 127.
 Attorney-General v. Bradlaugh, 400.
 ✓ Attorney-General v. De Keyser's Royal Hotel, 4, 61, 62, 218, 323, 325, 378, 379.
 Attorney-General v. G.S & W.R. Co. of Ireland, 220.
 ✓ Attorney-General v. Wilts United Dairies, 117, 119. ✓
 Attorney-General of British Columbia v. Attorney-General of Canada, 461.
 Attorney-General for Canada v. Cain, 314, 416.
 Attorney-General for N.S.W. v. Trethowan, 417.
 Attorney-General for Ontario v. Attorney-General for Canada, 421, 449.
 Attorney-General of Ontario v. Mercer, 461.
 Aynesham's Case, 240.

B

- Bailey v. Williamson, 29.
 ✓ Bainbridge v. Postmaster-General, 60, 224, 252. ✓
 Balfour v. Malcolm, 6.
 Bankers' Case, The, 218, 232, 233, 236, 237, 238, 241.
 Berkley's Case, The Lord, 3.
 Barnardo v. Ford, 182, 183.
 Barwis v. Keppel, 339, 347.
 Bates's Case, 36, 48, 49, 52, 58, 59, 72, 117, 300.
 Beatty v. Gillbanks, 352, 354, 358.
 Beaumont v. Barrett, 434.
 Beckford v. Wade, 435.
 Bentley's Case, Dr., 197.
 Benyon v. Evelyn, 86 n.
 Bildeston, Case of John, 38.
 Binyon's Case, 75.
 Blount's Case, 402.
 Boaler, *In re*, 25.
 Board of Education v. Rice, 138, 188, 205, 207.
 Bode's Case, Baron de, 240.
 Bombay and Persia S.N. Co. v. MacLay, 216, 227.
 Bonham's Case, 1.
 Bonnard v. Perryman, 268.
 Bowles v. Bank of England, 117.
 Bowser v. Collins, 212.
 Bradford Corporation v. Myers, 127, 214 n.
 Bradlaugh v. Clarke, 100.
 ✓ Bradlaugh v. Gosset, 77, 96.
 Brass Crosby's Case, 93.
 Brine v. Great Western Railway Co., 162.
 Bristol Grand Jury, Charge to the, 352, 359, 432.
 British Cast Plate Manufacturers v. Meredith, 162.
 Broadmayne, The, 323.
 Bromage v. Prosser, 109.
 Brownlow v. Metropolitan Board, 167.
 Burdett v. Abbot (1811), 74, 83, 90, 93, 94, 95, 101; do. (1817), 95.
 Buron v. Denman, 295, 297, 298, 309, 314, 439.
 Burr v. Smith, 133.
 Bushell's Case, 96, 127, 170.
 Byrne, Case of William, 393.

- Cail v. Papayanni, 7.
 Calder v. Bull, 441.

TABLE OF CASES

xv

Caledonian Ry. Co. v. North British Ry. Co., 20.
 Calvin's Case, 283, 284, 315, 422, 427, 429.
 Cameron v. Kyte, 465.
Campbell and Rolfe, Opinion of, 369, 371, 382, 385, 394.
Campbell v. Hall, 408, 425.
Canterbury, Viscount v. A.-G., 58, 222, 240, 244, 258.
 Carnatic, Nabob of, v. East India Co., 297, 464, 469.
 Carr's Case, 59.
 Carr v. Fracis, Times & Co., 296.
 Cayzer, Irvine & Co. v. Board of Trade, 3.
 Central Control Board (Liquor Traffic) v. Cannon Brewery Co., 4.
 Chabot v. Lord Morpeth, 403.
 Chambers v. Jennings, 402.
 Charles River Bridge v. Warren Bridge, 441.
Chester v. Bateson, 4, 10, 22.
 Church v. Inclosure Commissioners, 188, 191, 192.
 Churchward v. Reg., 220.
 Civilian War Claimants' Assn. v. R., 299 n.
 Clarke v. Bradlaugh, 100.
Clifford and O'Sullivan, 134, 189, 369, 374, 398.
 Clifton, Case of Gervais de, 245, 248, 249.
 Clifton, Case of Robert de, 249.
 Clothier v. Webster, 166.
 Coe v. Wise, 159.
 Cook v. Sprigg, 296.
 Coomber v. Justices of Berks., 3.
 Cooper v. Hawkins, 3.
Cooper v. Wandsworth Board of Works, 6, 140, 194.
 Coorg, Ex-Rajah of, v. East India Co., 469.
 Cox v. Hakes, 180, 182, 183, 184, 185.
 Crosby Tithes, *In re*, 188, 190.
 Cushing v. Dupuy, 447.
 Cuvillier v. Aylwin, 446, 447.

D

Dal Singh v. The King-Emperor, 449.
 Damodhar Gordhan v. Deoram Kanji, 301.
Darnel's Case, 37, 48, 53, 74, 117.

Dawkins v. Lord F. Paulet, 338, 339, 341.
 Dawkins v. Rokeby, 208, 339, 347.
 Davison v. Duncan, 106, 110, 114.
 Day v. Savadge, 2.
 Deare v. Attorney-General, 266, 269.
De Jager v. Attorney-General of Natal, 289, 292, 315.
 Dimes v. Grand Junction Canal Co., 194 n., 438.
 Dobie v. The Temporalities Board, 6.
 Dobree v. Napier, 296.
 Donne v. Walsh, 86.
Duff Development Co. v. Kelantan Government, 302, 303, 316.
 Duncan v. Findlater, 162, 165.
 Dunn v. McDonald, 60, 224.
Dunn v. Reg., 219, 224, 241.
Dyson v. Attorney-General, 227, 265.

F

Eastern Trust Co. v. Mackenzie, Mann, & Co., 227.
 East India Co. v. Syed Ally, 306.
 Ecclesiastical Persons, Case of, 3.
 Edinburgh and Dalkeith Ry. Co. v. Wauchope, 8.
 Edmonds v. Master, &c., of the Company of Watermen, 26.
 Egan v. Macready, 370, 376, 377, 378, 381.
 Eliot (Sir John) and others, Case of, 101.
 Elphinstone v. Bedreechund, 372, 388.
 Engelke v. Musmann, 303.
Entick v. Carrington, 59, 124, 145, 224.
 Esposito v. Bowden, 324.
 Everle's Case, 238, 239.
 Exchange Bank of Canada v. The Queen, 458.

F

Fabrigas v. Mostyn, 397, 463, 464.
 Falkland Islands Co. v. The Queen, 448.
 Feather v. Reg., 218, 222, 241, 314.
 Fenton Textile Association v. Krassin, 303.
 Ferdinand, Ex-Tsar of Bulgaria, *In re*, 295.
Ferguson v. Earl of Kinnoul, 133, 185.
 Fitzharris's Case, 86.

Forester v. Secretary of State for India, 297, 469.
 Fort Frances Pulp Co. v. Manitoba Free Press Co., 51.
 Foster v. Globe Venture Syndicate, 317.
 Fourie, *In re*, 370.
 Fray v. Blackburn, 169, 345.
 Frith v. Reg., 298.
 Frome United Breweries Co. v. Bath JJ., 136.

G

Gagara, The, 317.
 Galloway v. Mayor, &c., of London, 139.
 General Warrants, The Case of, 149.
 Gibson v. East India Co., 305.
 Gidley v. Lord Palmerston, 60, 224, 225, 262.
 Godden v. Hales, 55.
 Gould v. Stuart, 220.
 Graham v. Public Works Commissioners, 226.
 Grant v. Gould, 336, 339, 347, 369.
 Grey v. Pearson, 19.

H

Haggard v. Pélicier Frères, 169.
 Hall v. Smith, 162, 164.
 Hammersmith Ry. Co. v. Brand, 154.
 Hammersmith Rent-Charge Case, The, 196.
 Hampden's Case, 2, 36, 39, 48, 49, 52, 53, 54, 72, 117, 221, 353, 393.
 Hardy's Crown Brewery, *In re*, 268.
 Hearts of Oak Assurance Co. Ltd. v. A.-G., 141.
 Heddon v. Evans, 338, 339, 340.
 Higgins v. Willis, 374, 404.
 Hill v. Bigge, 423, 463, 464.
 Hobhouse's Case, 93, 94, 181.
 Hodge v. Attorney-General, 266, 269, 270.
 Hodge v. Reg., 412, 460.
 Holliday v. St. Leonard's, Shoreditch, 162, 167.
 Hoop, The, 324.
 Houlden v. Smith, 126.
 Hudson's Bay Co. v. MacLay, 9, 10, 21-2.
 Huyton and Roby Gas Co. v. Liverpool Corporation, 214 n.

I

Ibrahim v. The King, 448.
 Initiative and Referendum Act, *In re*, 448.
 Institute of Patent Agents v. Lockwood, 11, 13.
 Invincible, The, 68.
 Ionian Ships, The, 406.
 Irwin v. Grey, 216.

Jay v. Topham, 93.
 Jeffereys v. Boosey, 415.
 Jerusalem and Jaffa District Govr. v. Suleiman Murra, 406.
 Johnson v. Sargent, 13.
 Johnstone v. Pedlar, 296, 312, 381.
 Johnstone v. O'Sullivan, 376.
 Jones v. Bird, 162.
 Jones v. Mersey Board, 159, 161.
 Jones v. Monsell, 258.

K

Keighly v. Bell, 339, 351 n.
 Kielley v. Carson, 71 n., 435.
 Kildare Co. Council v. R., 218.
 Knollys's Case, 87.
 Kruse v. Johnson, 13, 26.

L

Lake v. King, 108.
 Lancaster Canal Co. v. Parnaby, 157.
 Lane v. Cotton, 161, 254, 256.
 Lapiush v. Braithwaite, 4.
 Law v. Llewellyn, 129.
 Leader v. Moxon, 162.
 Lee v. Bude and Torrington Ry. Co., 1, 2, 8.
 Lindo v. Rodney, 67.
 Local Government Board, *In re*, 192.
 Local Government Board v. Arlidge, 140, 143, 199.
 London Corporation v. Cox, 402.
 Long v. Bishop of Cape Town, 280.
 Luby v. Lord Wodehouse, 423, 468.
 Lutterloh v. Halsey, 261.

M

Macbeath v. Haldimand, 60, 224, 225, 226, 240, 260, 264.
 Mackenzie-Kennedy v. Air Council, 251.

Mackonochie v. Lord Penzance, 402.
Macleod v. A.-G. for New South Wales, 414, 416.
Magdalen College Case, The, 3, 220.
Mansergh, In re, 338, 339.
Marais, Ex parte, 369, 370, 372, 373, 376, 377, 378, 380, 381, 383, 393, 395, 398.
Maritime Bank of Canada, Liquidators of, v. Receiver-General of New Brunswick, 422, 458.
Markwald v. Attorney-General, 288 n.
Marshall Shipping Co. v. Board of Trade, 226.
Marshalsea, Case of the, 128, 212.
Mersey Docks Trustees v. Gibbs, 60, 126, 156.
Metcalfe v. Hetherington, 163, 167, 168.
Metropolitan Asylum District v. Hill, 125, 154.
Middlesex, Case of the Sheriff of, 74, 75, 76, 77, 92.
Mighell v. Sultan of Johore, 317, 321.
Miller v. Hope, 169.
Miller v. Knox, 353.
Milligan, Ex parte, 385, 394.
Mitchell v. Reg., 219.
Mogileff, The, 215.
Monckton v. Attorney-General, 267.
Montgomery v. Liebenthal, 321.
Mortensen v. Peters, 7.
Mostyn v. Fabrigas, 397, 463, 464.
Munster v. Lamb, 127.
Murray's Case, 93.
Musgrave v. Pulido, 315, 422, 423, 462.
Musgrove v. Chun Teeong Toy, 314.

N

Nadan v. R., 416, 442.
Nairn v. University of St. Andrews, 5.
Natal, In re Lord Bishop of, 272, 273, 278.
Nathan, In re, 216.
Newcastle Breweries v. R., 10.
Nicholson v. Mounsey, 161, 245.

O

Ogden v. Folliott, 441.
O'Kelly v. Harvey, 352, 356.
Oldham v. Lords of the Treasury, 240.

P

P. & O. Co. v. Kington, 416.
Palmer v. Hutchinson, 257.
Parlement-Belge, The, 215, 299, 317.
Paty's Case, 74, 75, 76, 87, 93, 94.
Pawlett v. Attorney-General, 266, 267.
Phillips v. Eyre, 5, 391, 397, 414, 431, 466.
Pickard v. Smith, 163.
Poe, In re, 403.
Poll v. Lord Advocate, 315.
Porter v. Freudenberg, 315.
Price v. Messenger, 128.
Proclamations, Case of, 35, 62, 63, 64.
Prohibitions del Roy, 35, 272, 276.
Provincial Cinematograph Theatres v. Newcastle Profiteering Committee, 399.
Prudential Assurance Co. v. Knott, 268.

Q

Quarman v. Burnett, 163.

R

Rainsford v. Browne, 394.
Rajah Salig Ram v. S. of S. for India, 469.
Raleigh v. Goschen, 60, 224, 250, 259.
Ranger v. Gt. Western Ry. Co., 438.
Rederiaktiebolaget 'Amphitrite' v. R., 220, 224, 242.
Reeve v. A.-G., 266.
Reg. v. Allen, 58, 271, 274.
Reg. v. Alloo Paroo, 447.
 — **v. Ames**, 447.
 — **v. Bank of Nova Scotia**, 458.
 — **v. Barnardo**, 183.
 — **v. Bertrand**, 445.
Reg. v. Boteler, 133, 137, 138, 196.
 — **v. Brown**, 353, 364.
Reg. v. Burah, 412.
 — **v. Comptroller-General of Patents**, 271.
 — **v. Dean of Rochester**, 194.
 — **v. Dillet**, 448.
 — **v. Doutre**, 218.
 — **v. Eduljee Byramjee**, 447, 448.
 — **v. Eyre**, 353, 369, 373, 385, 393.
 — **v. Fletcher**, 399.
 — **v. Gildenhuys**, 370, 373.
 — **v. Hastings Local Board**, 191.

Reg. v. Justices of Londonderry, 352, 357, 358.
 — v. Lesley, 296.
 — v. Local Government Board, 134, 402.
 — v. Lords Commissioners of the Treasury, 133, 225.
 — v. Millis, 440.
 — v. Nelson and Brand, 369, 373, 385, 393.
 — v. Paty, 74, 75, 76, 87, 93, 94.
 — v. Pharmaceutical Society of Ireland, 12.
 Reg. v. Rand, 135, 193.
 — v. Smith, 129, 340, 348, 374, 376.
 Rex v. Allen, 370, 373, 376, 377, 378, 380, 381, 389, 398.
 — v. Bates, 86, 48, 49, 52, 58, 59, 72, 117, 300.
 Rex v. Board of Education, 138, 268.
 — v. Board of Trade, 188.
 — v. Chancellor, &c., of Cambridge (Dr. Bentley's Case), 197.
 — v. Christian, 405.
 — v. Creevey, 86, 108, 114.
 — v. Dangerfield, 87 n.
 — v. Earl Crewe, *Ex parte* Sekgome, 405, 406.
 Rex v. Electricity Commissioners, 132, 134, 187.
 Rex v. Francis, *Ex parte* Markwald, 288 n.
 — v. Fursey, 362.
 — v. Garrett, 400. ✓
 Rex v. Halliday, 4, 6, 9, 14, 23.
 — v. Hampden, 2, 36, 39, 48, 49, 52, 53, 54, 72, 117, 221, 353, 393.
 Rex v. Hobhouse, 93, 94, 181.
 — v. Inhabitants in Glamorgan-shire, 188.
 — v. Legislative Committee, *Ex parte* Haynes Smith, 134.
 — v. Liverpool, 159.
 — v. Lord Abingdon, 108, 114.
 Rex v. Lynch, 289, 290.
 Rex v. Minister of Health, *Ex parte* Davis, 12.
 — v. Minister of Health, *Ex parte* Yaffe, 12, 143.
 — v. Nat Bell Liquors, 444.
 — v. Pease, 162.
 — v. Picton, 170.
 Rex v. Pinney, 352, 363, 393.

Rex v. Poor Law Commissioners, 188.
 — v. Stratton, 393.
 — v. William Hoove, 235.
 — v. Williams, 87, 88.
 — v. Woodhouse, 188.
 — v. Wright, 85, 106, 107, 108, 110.
 R. (Childers) v. Adjutant-General of the Provisional Forces, 381.
 R. (Garde) v. Strickland, 372, 373.
 R. (Ronayne and Mulcahy) v. Strickland, 376, 404.
 Riel v. Reg., 413.
 Ringer, *Ex parte*, 142.
 Roberts v. Hopwood, 139, 142.
 Rogers v. Rajendro Dutt, 221.
 Rolla, The, 439.
 Ronnfeldt v. Phillips, 6, 21.
 Rowland v. Air Council, 226.
 Royal Aquarium, &c., Co. v. Parkinson, 129, 207.
 Ruck v. Williams, 166.
 Russell, Case of Earl, 415.
 Rustomjee v. Reg., 298.
 Ryver v. Cosyn, 86.
 Ryves v. Duke of Wellington, 267.

S

St. Catherine's Milling, &c., Co. v. The Queen, 461.
 Salaman v. Secretary of State for India, 297, 315.
 Saltash, Case of Vicar of, 402.
 Saltpetre, Case of, 323, 325.
 Savage v. Lord North, 261.
 Scott v. Mayor of Manchester, 164.
 Scott v. Scott, 127, 141.
 Soot v. Stansfield, 170, 345.
 Seaman v. Netherclift, 127.
 ✓ Secretary of State for Home Affairs v. O'Brien, 133, 178. ✓
 Secretary of State for India v. Kama-chee Boye Sahaba, 295, 298, 304, 314, 468.
 (See also Tanjore, Case of Rajah of.)
 Seven Bishops, Case of the, 57.
 Shaftesbury, Case of Earl of, 93, 94.
 Shenton v. Smith, 219.
 Sheriff of Middlesex, Case of the, 74, 76, 77, 92.
 Ship-money, Case of, 2, 36, 39, 48, 49, 52, 53, 54, 72, 117, 221, 353, 393.
 Smith v. Chorley D.C., 138.

TABLE OF CASES

xix

Somerset, Duchess of, *v.* Earl of Manchester, 87.
 Southampton, &c., *Bridge v.* Southampton Local Board, 158, 166.
 South Australia, State of, *v.* State of Victoria, 424.
 ✓ *Stockdale v. Hansard*, 74, 76, 78, 92, 94, 97, 102, 107, 108, 111, 112, 117.
 Stoeck *v.* Public Trustee, 288 n.
 Sullivan *v.* Earl Spencer, 423.
 Sussex Peerage Case, 2.
 Sutton *v.* Clarke, 162.
 Sutton *v.* Johnstone, 338, 339, 344, 346, 375, 385.

T

Tandy *v.* Earl of Westmoreland, 423, 468.
 Tanjore, Case of Rajah of, 469.
 (See also *Secretary of State for India v. Kamachee Boye Sahaba.*)
 Taylor *v.* Barclay, 317.
 Taylor *v.* Hawkins, 109.
 Théberge *v.* Laudry, 447.
 Thomas *v.* Churton, 170.
 Thomas *v.* Reg., 218, 231.
 Thomas *v.* Sorrell, 57.
 Thorpe's Case, 84, 85.
 Tilonko *v.* A.-G. of Natal, 370, 372, 373, 393, 395, 400.
 Tobin *v.* Reg., 218, 222, 240, 314.

U

Unwin *v.* Wolseley, 264.

V

Venicoff, *Ex parte*, 144, 288.
 Von Frantzius *v.* Reg., 232.

W

Walker v. Baird, 296, 300, 310.
 Wall, Case of Governor, 394.
 Walton, *Ex parte*, 20.
 Ward *v.* Lee, 166.
 Warwick, Earl of, *v.* Dowager Duchess of Clarence, 235.
 Wason *v.* Walter, 77, 105.
 Webb *v.* Outtrim, 420, 447.
 Weir Hospital, *In re*, 268.
 Whitehouse *v.* Fellowes, 162, 167.

Whitfield v. Le Despencer, 161, 255.
Wilkes v. Wood, 147.
Williams v. Howarth, 421.
Wi Matus's Will, 447.
Windsor, &c., Ry. Co. v. Reg., 218.
 ✓ *Wise v. Dunning*, 352, 357.
Wolfe Tone, Case of, 370, 393, 394.
Wolff v. Oxholm, 441.
Woodhall, Ex parte, 399.
Wright v. Fitzgerald, 370, 373, 375, 394.
Wroth's Case, 233, 237.

Y

Year Books.

Ed. 3.

1 H. 22 E. 3. 3	.	.	215
M. 24 E. 3. 54	.	.	215
39 E. 3. 14	.	.	277

Hen. 4.

11 H. 4. 8	.	.	277
11 H. 4. 37	.	.	64

Hen. 6.

9 H. 6 Pasch. pl. 7, f. 3	.	235
34 H. 6 Trin. pl. 18, f. 51	.	235
34 H. 6. 51	.	248
35 H. 6. 60	.	3

Ed. 4.

8 E. 4. 23	.	.	325
22 E. 4. 33 b	.	.	212

Ed. 5.

1 E. 5. 5 a	.	.	254
-------------	---	---	-----

Hen. 7.

1 H. 7. f. 3. pl. 3	.	235
1 H. 7. 3 Bro. Pet. 19	.	248
1 H. 7. 4	.	277
2 H. 7.	.	56
7 H. 7. 11	.	248
11 H. 7. ff. 11-12	.	56
14 H. 7. f. 29	.	177
20 H. 7. 7 a	.	276

Hen. 8.

3 H. 8. f. 15	.	325
14 H. 8. 16 a	.	213
38 H. 8. Dy. 60 b	.	213

Z

Zamora, The, 62, 63, 66.
Zollverein, The, 7.

TABLE OF STATUTES

Charter of William I	.	.	.	.	.	.	.	.	.	40
Magna Carta	.	.	.	.	.	.	.	.	.	21, 40, 50
c. 29	.	.	.	.	.	.	.	.	.	277
c. 39	.	.	.	.	.	.	.	.	.	38
c. 40	.	.	.	.	.	.	.	.	.	23
52 Hen. 3									(Statute of Marlbridge, 1267) c. 1	277
4 Ed. 1									(Statute de Bigamis) c. 1	234
13 Ed. 1									(Statute of Westminster II, 1285)	
c. 1									(de Donis Conditionalibus)	3
c. 5										3, 277
De Tallagio non concedendo	.	.	.	.	.	.	.	.	.	40
Praerogativa Regis	.	.	.	.	.	.	.	.	.	32
2 Ed. 3. c. 1	.	.	.	.	.	.	.	.	.	277
c. 9	.	.	.	.	.	.	.	.	.	277
14 Ed. 3. stat. 2	.	.	.	.	.	.	.	.	.	40
25 Ed. 3	.	.	.	.	.	.	.	.	.	40
c. 5	.	.	.	.	.	.	.	.	.	277
28 Ed. 3. c. 3	.	.	.	.	.	.	.	.	.	277
37 Ed. 3. c. 18	.	.	.	.	.	.	.	.	.	277
43 Ed. 3. c. 3	.	.	.	.	.	.	.	.	.	277
45 Ed. 3. c. 4	.	.	.	.	.	.	.	.	.	36
4 Hen. 4. c. 22	.	.	.	.	.	.	.	.	.	277
9 Hen. 4	.	.	.	.	.	.	.	.	.	65
13 Hen. 4. c. 7	.	.	.	.	.	.	.	.	.	361
23 Hen. 6. c. 8	.	.	.	.	.	.	.	.	.	56
11 Hen. 7. c. 1	.	.	.	.	.	.	.	.	.	6
31 Hen. 8. c. 8	.	.	.	.	.	.	.	.	.	41, 64
1 Ed. 6. c. 12. § 5	.	.	.	.	.	.	.	.	.	64
1 Eliz. c. 1. ss. 16, 17, 18	.	.	.	.	.	.	.	.	.	281
									s. 18	282
3 Car. 1. c. 1									(Petition of Right, 1628)	40, 44, 48, 51, 54, 74, 335, 374, 389, 399 n.
16 Car. 1. c. 10	.	.	.	.	.	.	.	.	.	281
c. 11	.	.	.	.	.	.	.	.	.	281
									s. 4	281
17 Car. 1. c. 14	.	.	.	.	.	.	.	.	.	54
13 Car. 2. St. II. c. 12	.	.	.	.	.	.	.	.	.	281
13 & 14 Car. 2. c. 33									(Licensing Act, 1662)	151, 153
25 Car. 2. c. 2									(Test Act)	55, 56, 57
31 Car. 2. c. 2									(Habeas Corpus Act, 1679)	126
1 W. & M. sess. 2. c. 2									(Bill of Rights)	60 n., 77, 87, 117, 120
									s. 1	88
c. 5									(Mutiny Act, 1689)	335, 337
11 & 12 Wm. 3. c. 12									(Governors' Act, 1699)	437

TABLE OF STATUTES

xxi

12 & 13 Wm. 3. c. 2	(Act of Settlement, 1700)	272
7 Anne c. 5		284
1 Geo. 1. St. 2. c. 5	(Riot Act, 1714)	362
12 Geo. 2. c. 29. s. 1		210
24 Geo. 2. c. 44	(Constables Protection Act, 1751)	128, 145
25 Geo. 2. c. 36. s. 2		210
9 Geo. 3. c. 16		271
31 Geo. 3. c. 31	(Canada Act)	446
36 Geo. 3. c. 6		391
37 Geo. 3. c. 1		391
c. 38		391
38 Geo. 3. c. 14		391
c. 21		391
c. 74		391
39 Geo. 3. c. 11		391, 394
c. 50		391
40 Geo. 3. c. 2		392
41 Geo. 3. c. 14		392
c. 66		433, 440
42 Geo. 3. c. 85		437
56 Geo. 3. c. 100. s. 3		95
1 Geo. 4. c. 37		362
4 Geo. 4. c. 71		447
6 Geo. 4. c. 187. ss. 130-6		158
1 & 2 Wm. 4. c. 41		362
3 & 4 Wm. 4. c. 4	(Irish Coercion Act, 1833)	383
c. 41	(Judicial Committee Act, 1833)	416, 445, 446, 457
	s. 4	453
c. 85		306
3 & 4 Wm. 4. c. cxiii	(Maryport Harbour Act)	167
4 & 5 Wm. 4. c. 76	(Poor Law Amendment Act, 1834)	188
6 & 7 Wm. 4. c. 71	(Tithe Commutation Act, 1836), ss. 50, 51	191
2 & 3 Vict. c. 84. s. 1		198
3 & 4 Vict. c. 9	(Parliamentary Papers Act, 1840)	92, 112
5 & 6 Vict. c. 94	(Defence Act, 1842)	218, 330, 332
c. 113		440
6 & 7 Vict. c. 13		280
c. 39		440
7 & 8 Vict. c. 66		284
c. 69	(Judicial Committee Act, 1844)	416, 445, 446
	s. 1	445
c. 81. s. 83		440
8 & 9 Vict. c. 18	(Lands Clauses Consolidation Act, 1845)	4, 192
c. 118	(Commons Enclosure Act, 1845), ss. 14, 27, 32	191
10 & 11 Vict. c. 27	(Harbours, Piers, & Docks Clauses Act, 1847)	168
11 & 12 Vict. c. 44	(Justices' Protection Act, 1848)	129, 208
	ss. 8, 9	211
12 & 13 Vict. c. 68. s. 20		440

17 & 18 Vict. c. cxxiv	(Bradford Waterworks Act, 1854), s. 51	193
c. cxxix	s. 12	193
18 & 19 Vict. c. 54		418
c. 96	(Supplemental Customs Consolidation Act, 1855), s. 38	274
c. 120	(Metropolis Local Management Act, 1855), s. 76	194, 195
	s. 211	196
21 & 22 Vict. c. 98	(Local Government Act, 1858)	191
23 & 24 Vict. c. 34	(Petitions of Right Act, 1860)	216, 229-31
	s. 7	233
	s. 9	232
	s. 14	58
26 & 27 Vict. c. 112	(Telegraph Act, 1863)	252
	s. 3	252
	s. 6	252
	s. 18	252
	s. 42	252, 253, 256-7
27 & 28 Vict. c. 25	(Naval Prize Act, 1864)	66
28 & 29 Vict. c. 63	(Colonial Laws Validity Act, 1865)	414, 416, 418, 419, 420
	s. 2	436, 446
	s. 3	437
	s. 5	417, 418
29 & 30 Vict. c. 19	(Parliamentary Oaths Act, 1866)	98, 103
	s. 3	100
	s. 4	99, 100
c. 109	(Naval Discipline Act, 1866)	336
30 & 31 Vict. c. 3	(British North America Act, 1867)	412, 450, 452, 453, 455, 456, 459, 460, 461, 462
	s. 9	461
	s. 58	461
	s. 91	445, 448, 452
	s. 92	412, 448, 459, 460
	s. 101	452, 456
	s. 109	461
	s. 126	461
c. 6	(Metropolitan Poor Act, 1867)	154
31. & 32 Vict. c. 48	(Representation of the People (Scotland) Act, 1868), s. 27	5
c. 110	(Telegraph Act, 1868)	252
	ss. 2, 4	253
32 & 33 Vict. c. 62	(Debtors Act, 1869)	77
c. 68	s. 4	99
33 & 34 Vict. c. 14	(Naturalization Act, 1870)	284, 290
	s. 6	290, 291
	s. 15	291, 292
c. 90	(Foreign Enlistment Act, 1870)	129

TABLE OF STATUTES

xxiii

34 & 35 Vict. c. 70. s. 5	202, 206
36 & 37 Vict. c. 66	(Supreme Court of Judicature Act, 1873) 399, 400
s. 19	180, 182, 184
38 & 39 Vict. c. 55	(Public Health Act, 1875), ss. 182, 183, 184, 187 27
39 & 40 Vict. c. 59	(Appellate Jurisdiction Act, 1876), s. 3 184
40 & 41 Vict. c. 57	(Judicature Act (Ireland), 1877), s. 50 . 398, 399
44 & 45 Vict. c. 58	(Army Act, 1881) . 324, 336, 338, 350, 374, 397
45 & 46 Vict. c. 50	(Municipal Corporations Act, 1882) . . 27
s. 23	27
46 & 47 Vict. c. 57. s. 101, sub-s. 2 (Patents Act, 1883)	11
50 & 51 Vict. c. 54	(British Settlements Act, 1887) . . . 408
51 & 52 Vict. c. 41	(Local Government Act, 1888) . . . 27, 208
s. 3, sub-s. 5	211
s. 16	27
s. 78, sub-s. 2.	211
52 & 53 Vict. c. 49	(Arbitration Act, 1889) 316
s. 11	316, 321
s. 12	317, 320, 321
53 & 54 Vict. c. 37	(Foreign Jurisdiction Act, 1890) . . . 405
c. 70	(Housing of the Working Classes Act, 1890) . 204
56 & 57 Vict. c. 61	(Public Authorities Protection Act, 1893) 127, 213-14
59 & 60 Vict. c. 51	(Vexatious Actions Act, 1896) . . . 24
63 & 64 Vict. c. 12	(Commonwealth of Australia Act, 1900), s. 74 446
2 Ed. 7. c. 42	(Education Act, 1902). 188, 268
3 Ed. 7. c. 39	(Housing of the Working Classes Act, 1903) . 204
4 Ed. 7. c. 23	(Licensing Act, 1904), s. 2, sub-s. 1 . . 268
8 Ed. 7. c. 36	(Small Holdings and Allotments Act, 1908),
s. 39 (3)	142-3
9 Ed. 7. c. 9	(Union of South Africa Act, 1909), s. 106 . 446
c. 44	(Housing and Town Planning Act, 1909)
	200, 203, 204
s. 17	199
s. 39	199
sub-s. 1 (a)	199
10 Ed. 7. & 1 Geo. 5. c. 8 (Finance Act, 1909-10)	265
1 & 2 Geo. 5. c. 13	(Parliament Act, 1911) 118
3 & 4 Geo. 5. c. 3	(Provisional Collection of Taxes Act, 1913) . 118
4 & 5 Geo. 5. c. 17	(British Nationality and Status of Aliens Act,
8 & 9 Geo. 5. c. 38	1914-22) 284, 285-7
12 & 13 Geo. 5. c. 44	
s. 12 (1)	287
s. 17	315
5 & 6 Geo. 5. c. 8	(Defence of the Realm Consolidation Act,
1914)	9, 14, 23, 121, 178, 323, 328
s. 1	22
s. 1, sub-s. 1	14
par. (e)	23
sub-s. 2	329, 330

5 & 6 Geo. 5. c. 34	(Defence of the Realm Amendment Act, 1915)	17, 19
6 & 7 Geo. 5. c. 63	(Defence of the Realm, Acquisition of Land Act, 1916).	333
c. 68	(New Ministries and Secretaries Act, 1916), ss. 3, 4	119
	Air Force Act	336
9 & 10 Geo. 5. c. 100	(Electricity Supply Act, 1919)	187, 190, 192
10 & 11 Geo. 5. c. 31	(Restoration of Order in Ireland Act, 1920)	378, 379, 380, 381, 390, 396
	s. 1, sub-s. 1	178
	s. 2, sub-s. 1	396
c. 43	(Firearms Act, 1920)	390, 396, 401
c. 48	(Indemnity Act, 1920), s. 5	397
c. 55	(Emergency Powers Act, 1920)	353, 365-7
13 Geo. 5. sess. 2. c. 1	(Irish Free State Constitution Act, 1922)	179
	Arts. 51, 53	411
15 & 16 Geo. 5. c. 14	(Housing Act, 1925)	12, 13
c. 49	(Supreme Court of Judicature (Consolidation) Act, 1925), s. 12	126
22 Geo. 5. c. 4	(Statute of Westminster, 1931)	411, 416, 418, 419, 423, 471-4

REGULATIONS, ETC.

8 Hen. 4. Proclamation in London	65
22 Hen. 8. Proclamation B	65
5 Jac. 1. Proclamations	64
Rules of Supreme Court, Order XXV, r. 4	265, 267, 270
Defence of the Realm Regulations	323, 328
2	330
2 A (2)	22, 23
2 B	10
2 E	122
2 F	119, 122
14	15
14 B	14, 15-16, 18, 178
Restoration of Order in Ireland Regulations, 9 AA	401
Order in Council, August 13, 1920	178
para. 1, sub-s. 5	401

COLONIAL STATUTES

Alberta,

14 Geo. 5. c. 14 (Government Liquor Control Act, 1924)	442, 444
--	----------

Australia, Commonwealth of,

1903, No. 6 (Judiciary Act)	422 n., 447
No. 11 (Naturalization Act)	288 n.

TABLE OF STATUTES

xxv

Canada, Dominion of,	
38 Vict. c. 11 (Supreme Court Act, 1875).	453, 455
Supreme Court Act, 1891	455
R. S. Can., 1906, c. 139 (Supreme Court Act)	455
c. 146 (Criminal Code), s. 1025	416, 443, 444, 446
c. 152 (Canada Temperance Act)	442, 444
10 Geo. 5. c. 8	442
Cape of Good Hope,	
Act 6 of 1900	348
Jamaica,	
4 Geo. 2 (Limitation Act)	435
Manitoba,	
6 Geo. 5. c. 59 (Initiative and Referendum Act)	448
Natal,	
Act No. XIV of 1900	292
New South Wales,	
46 Vict. No. 17 (Criminal Law Amendment Act, 1883), s. 54	415
Civil Service Act, 1884	220
Act No. 28, 1929	417-18

TABLE OF ABBREVIATIONS

A. & E.	Adolphus and Ellis	Q. B. 1834-1841
Atk.	Atkyns	Ch. 1736-1754
B. & Ad.	Barnewall and Adolphus	K. B. 1830-1834
B. & Ald. }	Barnewall and Alderson	K. B. 1817-1822
B. & A. }		
B. & C.	Barnewall and Cresswell	K. B. 1822-1830
B. & P.	Bosanquet and Puller	C. P. 1796-1804
B. & S.	Best and Smith	Q. B. 1861-1870
Bacon's Abr.	Bacon's Abridgement of the Law.	
Beav.	Beavan	Rolls Court, 1838-1866
Bell C. C.	Bell, Crown Cases Reserved	C. C. R. 1858-1860
Bing.	Bingham	C. P. 1822-1834
Bing. N. C.	Bingham's New Cases	C. P. 1834-1840
Bl. Com. }	Blackstone's Commentaries.	
Bla. Com. }		
Bro. Abr. }	Brooke's Abridgement.	
Bro. }		
Bro. C. C.	Brown	Ch. 1778-1794
Bro. P. C.	Brown's Parliament Cases	H. L. 1702-1800
Brod. & B.	Broderip and Bingham	C. P. 1819-1822
Burr.	Burrow	K. B. 1756-1772
C. B.	Common Bench	C. P. 1845-1856
C. B. (N.S.)	Common Bench, New Series	C. P. 1856-1865
C. & Mar.	Carrington and Marshman	N. P. 1841-1842
C. & P.	Carrington and Payne	N. P. 1823-1841
Chitt. Rep.	Chitty	K. B. 1770-1822
Cl. & F. }	Clark and Finelly	H. L. 1831-1846
C. & F. }		
Com. Dig.	Comyns' Digest.	
Co. Rep.	Coke's Reports	1572-1616
Cowp.	Cowper	K. B. 1774-1778
C. Rob.	Christopher Robinson	Adm. 1798-1808
Dallas	Dallas, Supreme Court of U.S.	1790-1800
Dicey, L. C.	Dicey, Law of the Constitution, 8th edn.	
Doug.	Douglas	K. B. 1778-1785
Dow	Dow	H. L. 1812-1818
East	East	K. B. 1800-1812
E. & B.	Ellis and Blackburn	Q. B. 1852-1858
Ecc. & Adm.	Spinks' Ecclesiastical and Admiralty Reports	1853-1855
Esp.	Espinasse	N. P. 1793-1810
Ex. }	Exchequer	Ex. 1847-1856
Exch. }		
F.	Fraser, Court of Session Cases (Scotland)	1898-1906
F. (Just. Cas.)	Fraser, Judiciary Cases.	
F. & F.	Foster and Finlason	N. P. 1856-1867
Forsyth	Cases and Opinions in Constitutional Law.	
Fortescue	Fortescue	K. B. 1695-1738
Gall.	Garrison, U.S. First Circuit	1812-1815

TABLE OF ABBREVIATIONS

xxvii

Gardiner, <i>Hist. Eng.</i>	S. R. Gardiner, History of England from the Accession of James I.	
Halleck	Halleck, International Law.	
Hansard	Hansard's Parliamentary Debates.	
Hardres' Rep.	Hardres	Ex. 1655-1669
Hats. Prec.	Hatsell's Precedents.	
H. Bl.	Henry Blackstone	C. P. 1788-1796
H. L. C. }	House of Lords Cases	H. L. 1847-1866
H. L. R. }		
How. St. Tr.	(Howell's) State Trials.	
H. & N.	Hurlstone and Norman	Ex. 1856-1862
Hob.	Hobart	K. B. 1603-1625
Holdsworth, <i>H. E. L.</i>	Holdsworth, History of English Law.	
Inst.	Coke's Institutes.	
Knapp }	Knapp	P. C. 1829-1836
Knapp P. C. }		
Ld. Raym.	Lord Raymond	K. B. 1694-1732
L. Q. R.	Law Quarterly Review.	
Mac. & G.	Macnaghten and Gordon	Ch. 1849-1851
M. & S.	Maule and Selwyn	K. B. 1813-1817
M. & W.	Meeson and Welsby	Ex. 1836-1847
Mod.	Modern Reports	K. B., C. P., & Ch. 1669-1755
Moo. Ind. App.	Moore, Indian Appeals	P. C. 1836-1872
Moo. P. C. }	Moore, Privy Council Cases	P. C. 1836-1862
Moo. P. C. C. }		
Moo. P. C. (N.S.) }	Moore, Privy Council, New Series	P. C. 1862-1873
Moo. P. C. C. (N.S.) }		
New Rep.	New Reports	1862-1865
Peters	Peters, Supreme Court of U.S.	1827-1842
Ph.	Phillips	Ch. 1841-1849
Plowd.	Plowden	K. B. 1550-1580
Popham's Rep.	Popham	K. B. 1592-1627
Prynne's Reg.	Prynne, A Brief Register, &c., of Parliamentary Writs.	
Q. B.	Queen's Bench Reports	Q. B. 1841-1852
R. R.	The Revised Reports.	
Rep.	Coke's Reports	1572-1616
Rob. Adm.	Christopher Robinson	Adm. 1798-1808
Rolle's Abr.	Rolle's Abridgement.	
Rot. Parl.	Rolls of Parliament.	
Ryley's Pl. Parl.	Ryley, Placita Parliamentaria.	
Salk.	Salkeld	K. B. 1689-1712
Saund.	Saunders	K. B. 1666-1673
Shaw Sc. App. Cas.	Shaw, Scottish Appeal Cases	1821-1824
Sim.	Simons	Ch. 1826-1849
Skin.	Skinner	K. B. 1681-1698
Sm. L. C.	Smith's Leading Cases.	
Stra.	Strange	K. B. 1716-1749
St. Tr.	State Trials	1163-1820
St. Tr. (N.S.)	State Trials, New Series	1820-1858
Sup. Ct. Rep.	Canadian Supreme Court Reports.	
Swa.	Swabey	Adm. 1855-1859
Taunt,	Taunton	C. P. 1807-1819
T. L. R.	The Times Law Reports	1884-19—
T. R.	Term Reports by Durnford and East	K. B. 1785-1800

Vaugh.	Vaughan	C. P. 1665-1674
Ves.		
Ves. Jun. }	Vesey, Junior	Ch. 1789-1816
Wall. U.S.	Wallace, Supreme Court of U.S.	1861-1875
Wheaton	Wheaton, International Law.	
Wils.		
Wils. K. B. }	Wilson	K. B. 1742-1774
Wm. Bl. }		
W. Bl. }	William Blackstone	K. B. 1746-1780
Y. & C. Ex.	Younge and Collyer	Equity Ex. 1834-1842

References to the Year Books are by the regnal year and folio, thus :

Y. B. 14 H. 7 fol. 29.

Sometimes the law term and the plea are included in the reference, thus :

Y. B. 9 H. 6 Pasch. pl. 7, fol. 3.

Sometimes the letters Y. B. are omitted.

References to the Law Reports published by the Incorporated Council of Law Reporting are as follows :

L. R. Q. B.	Queen's Bench	1865-1875
L. R. C. P.	Common Pleas	1865-1875
L. R. Ex.	Exchequer	1865-1875
L. R. Ch.	Chancery Appeals	1865-1875
L. R. H. L.	House of Lords (English and Irish Appeals)	1865-1875
L. R. P. C.	Privy Council	1865-1875
L. R. Ind. App. }		
L. R. I. A. }	Indian Appeals	1865-1875
Q. B. D.	Queen's Bench Division	1875-1890
C. P. D.	Common Pleas Division	1875-1890
Ch. D.	Chancery Division	1875-1890
P. D.	Probate, &c., Division	1875-1890
App. Cas.	House of Lords and Privy Council	1875-1890
[189-] Q. B.	Queen's Bench Division	1891-1900
[19-] K. B.	King's Bench Division	1901-
[189-] Ch.	Chancery Division	1891-
[189-] P.	Probate, &c., Division	1891-
[189-] A. C.	House of Lords and Privy Council	1891-

The corresponding Irish Reports are referred to as follows :

Ir. C. L. R.	Irish Common Law Reports	1849-1866
Ir. Rep. C. L.	Irish Reports, Common Law	1866-1877
L. R. Ir.	Law Reports (Ireland) Chancery and Common Law	1877-1893
[189-] I. R.	Irish Reports	1894-

The Law Journal Reports are referred to as follows :

L. J. (K. B.)	King's Bench	1823-1837 & 1901-
L. J. (Q. B.)	Queen's Bench	1837-1901
L. J. (C. P.)	Common Pleas	1823-1901
L. J. (M. C.)	Magistrates' Cases	1823-

I

LEGISLATION

THE SOVEREIGNTY OF PARLIAMENT

Parliamentum omnia potest.

Per Mont. Ch.J.
(Com. Dig. tit. Parliament (H. 1.))

THE most celebrated discussion of this subject is in Dicey, *Law of the Constitution*, Part I. Here all that is intended is a short note on the relations between the Legislature and the Courts.

All that a court of law can do with an Act of Parliament is to apply it. Willes J. said in *Lee v. Bude and Torrington Junction Railway Co.*, (1871) L. R. 6 C. P. at p. 582,

'I would observe, as to these Acts of Parliament, that they are the law of this land; and we do not sit here as a court of appeal from parliament. It was once said,—I think in Hobart,—that, if an Act of Parliament were to create a man judge in his own case, the Court might disregard it. That dictum, however, stands as a warning, rather than an authority to be followed. We sit here as servants of the Queen and the legislature. Are we to act as regents over what is done by parliament with the consent of the Queen, lords, and commons? I deny that any such authority exists. If an Act of Parliament has been obtained improperly, it is for the legislature to correct it by repealing it: but, so long as it exists as law, the Courts are bound to obey it. The proceedings here are judicial, not autocratic, which they would be if we could make laws instead of administering them.'

This rule does not, however, result from any supposed incompetence of English courts to interfere with the exercise of legislative power, for there is in England nothing analogous to the French doctrine of the *séparation des pouvoirs*. The principle that the courts in France are incompetent to pass upon the validity of any legislation whatever seems to be accepted by the best legal authority in that country (see on this point Esmein, *Éléments de droit constitutionnel*, i. 587, 598). In England there is no doubt at all that the Courts may treat the acts of inferior legislative bodies as invalid (see *Subordinate Legislation* below). As to Acts of Parliament, it appears to have been a commonplace as late as the seventeenth century that statutes which were contrary to the reason of the Common Law (see *Bonham's Case*, (1610) 8 Co. Rep.

114a), or purported to take away any of the inseparable prerogatives of the Crown (see *Hampden's Case*, at pp. 45, 47, 51 below), were invalid. In *Day v. Savadge*, (1614) Hob. 87, the case in Hobart referred to by Willes J. in *Lee v. Bude and Torrington Railway*, it is said 'Even an Act of Parliament made against natural equity, as, to make a man judge in his own case, is void in itself; for, *jura naturae sunt immutabilia*, and they are *leges legum*'. But this doctrine seems never to have been applied by any Court, and since the seventeenth century there has been scarcely a suggestion of the kind.¹

It has, however, survived in an attenuated form. A statute which is contrary to the reason of the Common Law or purports to take away a prerogative of the Crown is none the less valid, but it will, so far as is possible, be applied in such a way as to leave the Prerogative or the common law rights of the subject intact. To this extent the reason of the Common Law still prevails; we cannot say that Parliament cannot do any of these things, but we can still say that there is a presumption against its doing them. If it is clear from the express words of the statute or by necessary implication that Parliament has intended to do them, *cadit quaestio*. As Tindal C.J. said in the *Sussex Peerage Case*, (1844) 11 Cl. & F. at p. 148,

'The only rule for the construction of Acts of Parliament is that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the law giver.'

The presumptions which regulate in some measure the application of statutes are of various kinds. The following are of peculiar interest to the constitutional lawyer.

(1) The Crown is not bound by Act of Parliament, in the absence of express words or necessary implication. This rule has been applied in many varieties of cases, but more especially so as to exempt from local rates and income tax not only Crown property in the strict sense of the term, but also property held by other persons in trust for purposes of 'government' (see especially

¹ For certain apparent exceptions see the article by H. H. L. Bellot in *The Quarterly Review*, April 1926.

Coomber v. Justices of Berks, (1888) 9 App. Cas. 61). It has even been applied to relieve from criminal liability the driver of a War Office lorry, who was exceeding the speed limit (*Cooper v. Hawkins*, [1904] 2 K. B. 164).

The rule is subject to certain exceptions, which are somewhat quaintly expressed in the following extract from the *Case of Ecclesiastical Persons*, (1601) 5 Co. Rep. 14 b:

‘In divers cases the King is bound by Act of Parliament, although he be not named in it, nor bound by express words. And therefore all statutes which are made to suppress wrong, or to take away fraud, or to prevent the decay of religion, shall bind the King although he be not named: for religion, justice, and truth are the sure supporters of the crowns and diadems of Kings. And therefore it is agreed in 35 H. 6. 60. that the King shall be bound by the stat. of West. 2. cap. 5. which makes provision against tortious usurpations, although the King be not named in the Act. So in *The Lord Barkley's Case* reported by Mr. Plowden, it is adjudged, that if a gift in tail be made to the King, he cannot alien to defraud him in reversion, or his issue, but is bound by the stat. of West. 2. de Donis Conditionalibus. And the said Act of 1 Eliz. proves, that Acts which restrain ecclesiastical persons from wasting their possessions, which are given to maintain the service of God, shall bind the King, if special provision had not been made to the contrary by the same Act; *et summa ratio est quae pro religione facit.*’

The rule has lately been subjected to severe criticism in *Cayzer, Irvine & Co., Ltd. v. Board of Trade*, [1927] 1 K. B. 269. It was there contended by Sir John Simon (*arguendo*) that the rule is derived from a statement in an unsuccessful argument in the *Magdalen College Case*, (1615) 11 Co. Rep. 66 b. This may well be so, but the rule has been acted upon so often in later cases before courts of the highest authority, that whatever may have been its origin, it must now be considered good law. In *Cayzer, Irvine & Co., Ltd. v. Board of Trade* the Court found it unnecessary to test the validity of the rule.

(2) The judges seem to have in their minds an ideal constitution, comprising those fundamental rules of Common Law which seem essential to the liberties of the subject and the proper government of the country. These rules cannot be repealed but by direct and unequivocal enactment; in the absence of express words or necessary intendment, statutes will be applied subject to them. They do not override the statute, but are treated, as it were, as implied

terms of the statute. Here may be found many of those fundamental rights of man which are directly and absolutely safeguarded in the American Constitution or the *Déclaration des Droits de l'Homme*. In England they are protected, but not absolutely, for Parliament may, if it thinks fit, and if it expresses its intention unequivocally, take them away.

The following rules, which are only special applications of the general principle that vested rights are not to be taken away without express words or necessary intendment or implication, should be noted as of particular constitutional importance.

(a) An intention to take away the property of a subject without giving him a legal right to compensation for the loss of it is not to be imputed to the Legislature unless that intention is expressed in unequivocal terms (per Lord Atkinson in *Central Control Board (Liquor Traffic) v. Cannon Brewery Co., Ltd.*, [1919] A. C. at p. 752. Parliament passed in 1845 a Lands Clauses Consolidation Act, to regulate the manner in which lands might be taken under the authority of Parliament, and compensation made for injury occasioned by what was thus legalized, and this Act is expressly or impliedly incorporated in Acts which confer powers of compulsory acquisition (see also *A.-G. v. De Keyser's Royal Hotel*, p. 325 below).

(b) Any legislative act which purports to invade the right of personal freedom should be construed strictly. This argument plays an important part in Lord Shaw's dissenting judgment in *R. v. Halliday* (p. 19 below); and, although the other judges came to a different conclusion from his, the disagreement did not relate to the existence or validity of this rule but rather to its applicability to the particular legislation in question in that case.

(c) In respect of his common law rights, a subject cannot without express words or necessary intendment be deprived of access to or the protection of the Courts. This was part of the *ratio decidendi* in *Chester v. Bateson* (p. 22 below).

(d) Penal statutes must be strictly construed. This argument also was used to no effect in *R. v. Halliday*. It is open to doubt whether the force of the rule is as great as it was formerly, but it still comes into play occasionally (see *Lapish v. Braithwaite*, [1925] 1 K. B. 474).

The same rule is applicable to taxing statutes.

(e) Statutes are presumed to have no retrospective effect.

Reference should be made at this point to the remarks of Willes J. in *Phillips v. Eyre* (p. 488 below).

(3) The general structure of government cannot be altered by a side-wind. Thus, in *Nairn v. University of St. Andrews*, [1909] A. C. 147, the question was raised whether on the true construction of s. 27 of the Representation of the People (Scotland) Act, 1868, women graduates of a Scottish University were entitled to the parliamentary franchise. The material parts of the section were as follows: 'Every person whose name is for the time being on the register . . . of the general council of such university, shall, if of full age, and not subject to any legal incapacity, be entitled to vote in the election of a member to serve in any future Parliament for such university in terms of this Act.' At a date subsequent to the passing of this Act, the University had allowed the names of women graduates to be entered on the register, and certain women who were graduates of the University claimed that upon being registered as such they became entitled to vote in the election of members of parliament for the University. The words of the section, 'not subject to any legal incapacity', made their position difficult, and Lord Loreburn L.C. held that they came within those words and were by reason of them disqualified from voting, but he went on to say,

'I will only add this much as to the case of the appellants in general. It proceeds upon the supposition that the word "person" in the Act of 1868 did include women, though not then giving them the vote, so that at some later date an Act purporting to deal only with education might enable commissioners to admit them to the degree, and thereby also indirectly confer upon them the franchise. It would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentous and far-reaching by so furtive a process' (at p. 161).

Lord Ashbourne and Lord Robertson did not disagree with the Lord Chancellor's argument on the words of the Act, but preferred to rest their judgments on the broader ground, Lord Ashbourne saying,

'If it was intended to make a vast constitutional change in favour of women graduates, one would expect to find plain language and express statement' (at p. 163);

and Lord Robertson,

'I have only to add that if I have not in this judgment relied on the words about legal incapacity, it is not that I do not consider the

argument on them to be legitimate. But I prefer broader grounds, and I think that a judgment is wholesome and of good example which puts forward subject-matter and fundamental constitutional law as guides of construction never to be neglected in favour of verbal possibilities' (at p. 165).

So also the jurisdiction of the Supreme Courts of England and Scotland can only be taken away by positive and clear enactments in an Act of Parliament (see *Balfour v. Malcolm*, (1842) 8 Cl. & F. at p. 500); and many of the rules illustrated in the section on *Judicial Control of Public Authorities* enjoy the same modified protection from hasty and inadvertent repeal (see especially *Cooper v. Wandsworth Board of Works*, p. 194 below).

(4) During the late war the maxim *salus populi suprema lex* was used to justify a benevolent interpretation of statutes to the advantage of the executive. At any rate it seems that during a time of national danger the presumption in favour of the liberty of the subject is very much weakened (see *Ronnfeldt v. Phillips* and *R. v. Halliday*, pp. 21 and 14, below).

* * *

These rules impose no limitations on the power of Parliament. But no doubt there are limits to that power. One of them is known to the law. Blackstone writes (1 Bl. Com. 90):

'Acts of parliament derogatory from the power of subsequent parliaments bind not. So the statute 11 Hen. VII. c. 1. which directs, that no person for assisting a king *de facto* shall be attainted of treason by act of parliament or otherwise, is held to be good only as to common prosecutions for high treason; but will not restrain or clog any parliamentary attainder. Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if it's ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavour to tie up the hands of succeeding legislatures. "When you repeal the law itself, says he, you at the same time repeal the prohibitory clause, which guards against such repeal."'

With this exception, there is, as Lord Watson said in *Dobie v. The Temporalities Board*, (1882) 7 App. Cas. at p. 146, 'really no practical limit to the authority of a supreme Legislature except the lack of executive power to enforce its enactments'. The lack

of such executive power over persons outside the effective control of the State led at one time to an impression that Acts affecting them were *pro tanto* invalid. But this is not so. Dr. Lushington said in *Cail v. Papayanni*, (1868) 1 Moo. P. C. (N.S.) at p. 474:

‘Now, I have always recognized the full force of this objection, that the British Parliament has no proper authority to legislate for Foreigners out of its jurisdiction; and I specially did so in the case of the *Zollverein*, (1856) Swa. 96. No Statute ought, therefore, to be held to apply to Foreigners with respect to transactions out of British jurisdiction, unless the words of the Statute are perfectly clear; but I never said that if it pleased the British Parliament to make such laws as to Foreigners out of the jurisdiction, that Courts of Justice must not execute them; indeed, I said the direct contrary,—speaking of the Instance Court of Admiralty, reserving any particular considerations that might attach to the Prize Court.’

Attempts to generalize from this supposed limitation, so as to deny altogether the competence of Parliament to legislate in derogation of the rules of international law would likewise fail. In the Scottish case of *Mortensen v. Peters*, (1906) 8 F. (Just. Cas.), Lord Dunedin said (at p. 100):

‘In this Court we have nothing to do with the question of whether the Legislature has or has not done what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an Act of the Legislature is ultra vires as in contravention of generally acknowledged principles of International Law. For us an Act of Parliament duly passed by Lords and Commons, and assented to by the King, is supreme, and we are bound to give effect to its terms.’

And there is this further difficulty in attempting to limit the legislative authority of Parliament by reference to rules of international law, that, as Lord Dunedin went on to observe (at p. 101),

‘It is a trite observation that there is no such thing as a standard of International Law extraneous to the domestic law of a kingdom, to which appeal may be made. International Law, so far as this Court is concerned, is the body of doctrine regarding the international rights and duties of states which has been adopted and made part of the law of Scotland.’

The same is of course true of England.

Save for these instances the necessary validity of public Acts of Parliament has never in modern times been seriously in doubt. On the other hand, the quasi-judicial character of the procedure employed in private bill legislation has occasionally suggested the idea that a private act may be impugned for the same reasons as a judgment of a court of law. *Lee v. Bude and Torrington Junction Railway Co.* was a case of this kind, but a more interesting pronouncement on this particular point is that of Lord Campbell in *Edinburgh and Dalkeith Railway Co. v. Wauchope*, (1842) 8 Cl. & F. at p. 723:

'My Lords, I think it right to say a word or two upon the point that has been raised with regard to an Act of Parliament being held inoperative by a Court of Justice because the forms prescribed by the two Houses to be observed in the passing of a bill have not been exactly followed. There seems great reason to believe that an idea to that effect has prevailed to some extent in Scotland, for it is brought forward in these papers as a substantive ground of objection to the applicability of the later Act of Parliament; the objection being, that this Act being a private Act, it is inoperative as to the pursuer because he had not proper notice of the intention to apply to Parliament to pass such an Act. This defence was entered into in the Court below, and the fact of want of notice was made the subject of inquiry, and the Lord Ordinary, in the note appended to his interlocutor, gave great weight to this objection. He said, "he is by no means satisfied that due Parliamentary notice was given to the pursuer previous to the introduction of this last Act: undoubtedly no notice was given to him personally, nor did the public notices announce any intention to take away his existing rights. If, as the Lord Ordinary is disposed to think, these defects imply a failure to intimate the real design in view, he should be strongly inclined to hold . . . that rights previously established could not be taken away by a private Act, of which due notice was not given to the party meant to be injured." . . . I cannot but express my surprise that such a notion should ever have prevailed. There is no foundation whatever for it. All that a Court of Justice can do is to look to the Parliamentary roll: if from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.'

This was dictum, inasmuch as Counsel for the Respondent had abandoned the argument before the case reached the House of

Lords, but it won the whole-hearted approval of the other Lords who were present.

B. SUBORDINATE LEGISLATION

Many authorities besides the sovereign Parliament exercise legislative functions. The most important of these, the King in Council, legislates by Proclamation, Letters Patent, and Orders in Council; the Rules which regulate the procedure of the Supreme Court are made by a Rules Committee, consisting of certain judges and members of the legal profession; Government Departments have wide powers of issuing Statutory Regulations and Orders relating to matters within their sphere; while Local Authorities and Public Utility Companies make by-laws.

Save in so far as legislative powers exist by virtue of the Prerogative, they must be derived from a Parliamentary grant. In either case the Courts reserve to themselves the right to pass upon the validity of the resulting enactments. Here a distinction must be drawn between by-laws and other forms of subordinate legislation.

In the latter the only question to be decided is whether the enactment is *intra vires* or *ultra vires*. If the subordinate legislature has kept within the powers delegated to it, its acts are necessarily valid. But the limits set to these powers may be so wide that the Courts find their opportunities of control reduced to a minimum, and such practical control as they may retain will depend on their readiness to apply restrictive rules of construction to the empowering statute.

The supreme importance of these rules could hardly be better demonstrated than in the great case of *R. v. Halliday* (p. 14 below). There the point at issue between Lord Shaw and the twelve judges and law-lords who were of a contrary opinion was purely one of construction. The result of the decision was to make it almost impossible for the Courts to interfere with the exercise of the legislative powers delegated to the Executive for the period of the War by the Defence of the Realm Act.

The only restrictive rules applicable to it were illustrated by the decision of Greer J. in *Hudson's Bay Co. v. MacLay* (1920) 86 T. L. R. 469, where the validity of a Regulation made under the Act was impugned. He held that these Regulations could continue

in force only during the period of the War, that they must be made with the honest intention of securing the public safety and the defence of the realm, and must on the face of them be reasonably capable of doing so. In fact, on only two occasions was a regulation declared by the Courts to be invalid. In *Newcastle Breweries Ltd. v. R.*, [1920] 1 K. B. 854, Salter J. decided that Regulation 2 B was *ultra vires* because it could not be fairly held to aid in securing the public safety or the defence of the realm that a person should be deprived of the full market value of his goods commandeered by the military authorities. But Greer J. disapproved of this decision in *Hudson's Bay Co. v. MacLay*, and his reasoning seems sounder in point of law. The other decision, *Chester v. Bateson* (p. 22 below), is undoubtedly good law, but surely there could be no more extreme case.

For obvious and sufficient reasons, subordinate legislation was most abundant and its control by the Courts most attenuated during the War. But it should be clearly recognized that the delegation of legislative authority has for almost a century been an integral part of English government. The steady expansion of the sphere of action of the State has necessitated constant legislation on matters of administrative detail, and Parliament has for various reasons preferred not to reserve this function exclusively to itself, but to confer it upon the central Government Departments charged with the duty of exerting a continuous expert control over the conduct of internal affairs. This tendency has in recent years been strongly accentuated, mainly no doubt owing to the highly technical nature of the subjects with which such legislation must deal, but also because of the need for enabling the administration to act quickly and effectually without having recourse to the slow and cumbrous process of obtaining a parliamentary enactment. It has become increasingly common for Parliament to content itself with inserting in statutes a general expression of its intention and leaving the details to be elaborated by regulations enacted under statutory authority by the government department to which has been entrusted the execution of the statute.¹ So long as the Courts are left with some measure of control, the departure has no doubt been beneficial. But the power to legislate has very commonly been delegated in terms so wide as apparently to exclude effective con-

¹ On this subject reference should be made to Dr. C. K. Allen's *Law in the Making*, ch. vii (second edition, Oxford, 1930), and to Dr. C. T. Carr's *Delegated Legislation* (Cambridge, 1921).

trol by the Courts. Provision is made that regulations, rules, and orders made under an Act of Parliament shall have effect as though enacted in the Act itself; or that they shall be final and not subject to appeal in any Court; or that their confirmation by a specified Minister shall be conclusive evidence that the requirements of the Act authorizing them have been complied with. In some cases, the subordinate legislative authority is even empowered to vary or rescind substantive provisions of the Act it has to administer. Doubtless such clauses are inserted with the honest intention of facilitating administrative action without inflicting injustice on the subject, but their effect too often is to make his adequate protection by the Courts as difficult even in normal times as it proved to be under the stress of war.

The establishment of judicial control has not been made easier by the somewhat uncritical respect which has been accorded to the dicta of the House of Lords in *Institute of Patent Agents v. Lockwood*, [1894] A. C. 347, an appeal from the refusal of the Court of Session in Scotland to make a declaration of illegality and grant an interdict against a patent agent who had continued to practise while refusing to pay the fees necessary for his name to be placed on the register of the Institute. The rule imposing these fees had been made by the Board of Trade under the Patents Act, 1883, which, while establishing the register, had left the Board to regulate the procedure for registration by rules which should, provided they were laid before the House of Commons and not annulled by resolution within forty days, be of the same effect as if they were contained in the Act. The Court of Session had held that the rule was *ultra vires*, and that in any case the remedy sought was misconceived. The House of Lords upheld the judgment on the latter ground, while holding that the rule itself was *intra vires*. Even if it had been necessary for the Lords to come to a decision on this latter point, which is doubtful, it was certainly unnecessary for them to go further and to inquire whether, if the rule had been *ultra vires* but the Commons had omitted to annul it, the provision referred to would have precluded the Courts from passing upon its validity. Some of them nevertheless did so. Lord Herschell said, at p. 359:

‘My Lords, I have asked in vain for any explanation of the meaning of those words or any suggestion as to the effect to be given to them if notwithstanding that provision, the rules are open to review and consideration by the Courts. The effect of an enactment is that it binds

all subjects who are affected by it. . . . The effect of a statutory rule if validly made is precisely the same. . . . But there is this difference between a rule and an enactment, that whereas apart from such provision as we are considering, you may canvass a rule and determine whether or not it was within the power of those who made it, you cannot canvass in that way the provisions of an Act of Parliament. . . . I own I feel very great difficulty in giving to this provision, that they "shall be of the same effect as if they were contained in this Act," any other meaning than this, that you shall for all purposes of construction or obligation or otherwise treat them exactly as if they were in the Act.'

If this statement of the law be correct, then, notwithstanding the saving words 'if validly made' (of which, indeed, it is difficult to see the exact significance), the application of the *ultra vires* test becomes impossible so soon as a statutory rule or order to which such a provision extends has actually been made, no matter how much it may be open to challenge. Both the objects aimed at and the procedure prescribed by the Act under which it purports to be made may have been disregarded by the enacting authority, but the Courts, on this view, would be powerless to interfere. As late as the case of *R. v. Minister of Health; Ex parte Davis*, [1929] 1 K. B. 619, the Court, while intervening to prevent the Minister from making an order unauthorized by the Housing Act, 1925, so far accepted the dicta quoted above as to express the opinion that, had the order once been made, their jurisdiction would have been ousted. But this view, which had already failed to commend itself to the Irish Court of Appeal in *Reg. v. Pharmaceutical Society of Ireland*, [1899] 2 I. R. 182, was emphatically rejected in *R. v. Minister of Health; Ex parte Yaffe*, [1930] 2 K. B. 98, by Swift J., *dissentiente*, in the Divisional Court, and by all three Lords Justices of Appeal; and although the House of Lords later reversed their decision, it did so without rejecting the reasoning on which they had decided the point here under discussion.

Both *Davis's Case* and *Yaffe's Case* arose out of housing schemes prepared under the Housing Act, 1925. By s. 40, sub-s. 1 of the Act, a local authority, having prepared a scheme and fulfilled certain conditions, was to petition the Minister to confirm it by order. Sub-s. 8 empowered the Minister to confirm such schemes by order, with or without modifications. By sub-s. 5, his order, when made, was to have effect as if enacted in the Act. In the former case, the Minister had not yet confirmed the scheme by order when the Court

intervened to prohibit him from going further with it, on the ground that, as submitted to him, it was not a valid scheme within the meaning of the Act, and that therefore he could have no authority to consider and confirm it. In the latter case, the Minister had actually made an order confirming the scheme, though, as he acknowledged in the Divisional Court and did not seriously contest in the Court of Appeal, it was *ultra vires* in the form originally presented to him, and had been modified by him under sub-s. 3. He relied, however, on sub-s. 5 as having given his order, once made, the force of a statute, and thereby removed it from judicial review. This contention was accepted by the Divisional Court, but the Court of Appeal refused to admit that sub-s. 5 could operate save in respect of an order which the Minister had authority to make. Here no scheme complying with the requirements of the Act had been submitted to him by the local authority, and until that defect had been supplied there was no subject-matter on which he could exercise his legislative powers. The Court of Appeal held further (though here their view was not accepted by the House of Lords) that his powers under sub-s. 3 did not extend to modifying *ultra vires* schemes so as to make them conform to the statute. Finally, they held that if the Minister had never been in a position to make an order, his own statement that he had done so was a mere statement of fact, into which the Courts might inquire, and was not sufficient to bring whatever he alleged to be an order under the protection of sub-s. 5. It is permissible to hope that with this decision the dicta in *Lockwood's Case* may in future be less often appealed to.

In any event, subordinate legislation takes effect only when it is published to the outside world, whereas a statute takes effect on the earliest moment of the day on which it is passed or is declared to come into operation; for whereas the passing of a statute is preceded by prolonged and open discussion, many acts of subordinate legislation are imposed on the public without previous warning (see *Johnson v. Sargent*, [1918] 1 K. B. at p. 109).

By-laws, while subject to the same control as other acts of subordinate legislation, are also assailable, *inter alia*, on the ground of unreasonableness. But this test is much more benevolently applied to by-laws of public authorities than to those made by public utility companies or other private persons (*Kruse v. Johnson*, p. 26 below).

CASES

✓ **REX v. HALLIDAY.** *Ex parte ZADIG* [1917] A. C. 260

HOUSE OF LORDS

LORD FINLAY L.C.—My Lords, the appellant in this case is a naturalized British subject of German birth who has been interned by an order made by the Secretary of State under the powers of reg. 14 B, which was made under the Defence of the Realm Consolidation Act, 1914.

It was contended on behalf of the appellant that reg. 14 B was not authorized by the Act and was *ultra vires*.

It is beyond all dispute that Parliament has power to authorize the making of such a regulation. The only question is whether on a true construction of the Act it has done so.

The relevant part of the Act in question (5 Geo. 5, c. 8) is s. 1, sub-s. 1:

‘His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council and of the members of His Majesty’s forces and other persons acting in his behalf; and may by such regulations authorise the trial by courts-martial, or in the case of minor offences by Courts of summary jurisdiction, and punishment of persons committing offences against the regulations, and in particular against any of the provisions of such regulations designed—

- ‘(a) to prevent persons communicating with the enemy or obtaining information for that purpose or any purpose calculated to jeopardise the success of the operations of any of His Majesty’s forces or the forces of his Allies or to assist the enemy; or
- ‘(b) to secure the safety of His Majesty’s forces and ships and the safety of any means of communication and of railways, ports, and harbours; or
- ‘(c) to prevent the spread of false reports or reports likely to cause disaffection to His Majesty or to interfere with the success of His Majesty’s forces by land or sea or to prejudice His Majesty’s relations with foreign Powers; or
- ‘(d) to secure the navigation of vessels in accordance with directions given by or under the authority of the Admiralty; or

‘(e) otherwise to prevent assistance being given to the enemy or the successful prosecution of the war being endangered.’

The power conferred on His Majesty is limited to the duration of the war and is to issue regulations for securing the public safety and the defence of the realm. The sub-section goes on to provide that His Majesty may by such regulations authorize the trial and punishment of persons committing offences against the regulations, and especially against regulations designed for any of the purposes enumerated under heads (a), (b), (c), (d), and (e). [*His Lordship shortly recapitulated these heads.*]

On the face of it the statute authorizes in this sub-section provisions of two kinds—for prevention and for punishment. Any preventive measures, even if they involve some restraint or hardship upon individuals, do not partake in any way of the nature of punishment, but are taken by way of precaution to prevent mischief to the State. Any one who infringes such regulations will become the proper subject of punishment.

The regulation in question made under this statute is reg. 14 B of the Defence of the Realm (Consolidation) Regulations. It is as follows:

‘Where on the recommendation of a competent naval or military authority or of one of the advisory committees hereinafter mentioned it appears to the Secretary of State that for securing the public safety or the defence of the realm it is expedient in view of the hostile origin or associations of any person that he shall be subjected to such obligations and restrictions as are hereinafter mentioned, the Secretary of State may by order require that person forthwith, or from time to time, either to remain in, or to proceed to and reside in, such place as may be specified in the order, and to comply with such directions as to reporting to the police, restriction of movement, and otherwise as may be specified in the order, or to be interned in such place as may be specified in the order:

‘Provided that any such order shall, in the case of any person who is not a subject of a State at war with His Majesty, include express provision for the due consideration by one of such advisory committees of any representations he may make against the order.

‘If any person in respect of whom any order is made under this regulation fails to comply with any of the provisions of the order he shall be guilty of an offence against these regulations, and any person interned under such order shall be subject to the like restrictions and may be dealt with in like manner as a prisoner of war, except so far as the Secretary of State may relax such restrictions.



'The advisory committees for the purposes of this regulation shall be such advisory committees as are appointed for the purpose of advising the Secretary of State with respect to the internment and deportation of aliens, each of such committees being presided over by a person who holds or has held high judicial office.

'In the application of this regulation to Scotland references to the Secretary for Scotland shall be substituted for references to the Secretary of State.

'Nothing in this regulation shall be construed to restrict or prejudice the application and effect of regulation 14, or any power of internment of aliens who are subjects of any State at war with His Majesty.'

It will be observed that any action of the Secretary of State under this regulation is to be upon the recommendation of a competent naval or military authority or of an advisory committee. If on such recommendation it appears to the Secretary of State that, for securing the public safety or the defence of the realm, it is expedient so to do, he may subject any person of hostile origin or associations to certain restrictions, one of which is internment. The order must, however, include provision in the case of any person not being an enemy subject for consideration of any representation which the person affected may make against the order by an advisory committee, which is to be presided over by a person who holds or has held high judicial office. The regulation, therefore, provides means for ascertaining whether any complaint against the justice or necessity of the order is well founded.

The order complained of was made by the Home Secretary on October 15, 1915, and is as follows:

'Whereas, on the recommendation of a competent military authority, appointed under the Defence of the Realm Regulations, it appears to me that, for securing the public safety and the defence of the realm, it is expedient that Arthur Zadig, of 56, Portsdown Road, Maida Vale, W. should, in view of his hostile origin and associations, be subjected to such obligations and restrictions as are hereinafter mentioned.

'I hereby order that the said Arthur Zadig shall be interned in the institution in Cornwallis Road, Islington, which is now used as a place of internment, and shall be subject to all the rules and conditions applicable to aliens there interned.

'If within seven days from the date on which this order is served on the said Arthur Zadig he shall submit to me any representations against the provisions of this order, such representations will be referred to the advisory committee appointed for the purpose of advising me

with respect to the internment and deportation of aliens and presided over by a judge of the High Court, and will be duly considered by the committee. If I am satisfied by the report of the said committee that this order may be revoked or varied without injury to the public safety or the defence of the realm, I will revoke or vary the order by a further order in writing under my hand. Failing such revocation or variation this order shall remain in force.

‘(Signed) JOHN SIMON,

‘One of His Majesty’s Principal Secretaries of State.

‘Whitehall, 15th October, 1915.’

The truth of the recital that Zadig is a person of hostile origin and associations was not questioned, but it was insisted that Parliament had not conferred the power to make such an order in the interest of the public safety against such persons. The order provides for representations being made against it and for their consideration by an advisory committee presided over by a judge of the High Court, and states that, if the Home Secretary is satisfied by the report of such committee that the order may be revoked or varied without injury to the public safety and the defence of the realm, he will revoke or vary the order.

As I have stated, the power of Parliament to authorize such a proceeding was not and could not be disputed. The only question is as to the construction of the Act.

It was contended (1.) that some limitation must be put upon the general words of the statute; (2.) that there is no provision for imprisonment without trial; (3.) that the provisions made by the Defence of the Realm Act, 1915, for the trial of British subjects by a civil Court with a jury strengthened the contention of the appellant; (4.) that general words in a statute could not take away the vested rights of the subject or alter the fundamental law of the constitution; (5.) that the statute is in its nature penal and must be strictly construed; (6.) that a construction said to be repugnant to the constitutional traditions of this country could not be adopted.

Reference was made by the appellant’s counsel to the history of the various interferences with a right to habeas corpus in times of public danger, and it was urged that if it had been intended to interfere with personal liberty this is the course which would have been adopted.

I am unable to accede to any of the arguments urged on behalf of the appellant.

It was not, as I understand the argument, contended that the words of the statute are not in their natural meaning wide enough to authorize such a regulation as reg. 14 B, but it was strongly contended that some limitation must be put upon these words, as an unrestricted interpretation might involve extreme consequences, such as, it was suggested, the infliction of the punishment of death without trial.

It appears to me to be a sufficient answer to this argument that it may be necessary in a time of great public danger to entrust great powers to His Majesty in Council, and that Parliament may do so feeling certain that such powers will be reasonably exercised.

The statute in its recital of the objects of the regulations in respect of which particularly punishment may be inflicted throws some light on the question before the House.

The regulations are to be for preventive purposes as follows:

[His Lordship shortly stated the preventive purposes of the regulations. See p. 14 above.]

One of the most obvious means of taking precautions against dangers such as are enumerated is to impose some restriction on the freedom of movement of persons whom there may be any reason to suspect of being disposed to help the enemy. It is to this that reg. 14 B is directed. The measure is not punitive but precautionary. It was strongly urged that no such restraint should be imposed except as the result of a judicial inquiry, and indeed counsel for the appellant went so far as to contend that no regulation could be made forbidding access to the seashore by suspected persons. It seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a Court of law. No crime is charged. The question is whether there is ground for suspicion that a particular person may be disposed to help the enemy. The duty of deciding this question is by the order thrown upon the Secretary of State, and an advisory committee, presided over by a judge of the High Court, is provided to bring before him any grounds for thinking that the order may properly be revoked or varied.

The statute was passed at a time of supreme national danger,

which still exists. The danger of espionage and of damage by secret agents to ships, railways, munition works, bridges, &c., had to be guarded against. The restraint imposed may be a necessary measure of precaution, and in the interests of the whole nation it may be regarded as expedient that such an order should be made in suitable cases. This appears to me to be the meaning of the statute. Every reasonable precaution to obviate hardship which is consistent with the object of the regulation appears to have been taken.

It was urged that if the Legislature had intended to interfere with personal liberty it would have provided, as on previous occasions of national danger, for suspension of the rights of the subject as to a writ of habeas corpus. The answer is simple. The Legislature has selected another way of achieving the same purposes, probably milder as well as more effectual than those adopted on the occasion of previous wars.

The suggested rule as to construing penal statutes and the provision as to trial of British subjects by jury made by the Defence of the Realm Act, 1915, have no relevance in dealing with an executive measure by way of preventing a public danger.

The application of the present appellant was rejected by the Divisional Court, consisting of five members, and by the Court of Appeal, and in my opinion the present appeal ought to be dismissed.

LORD SHAW OF DUNFERMLINE. (*dissentiente*). . . .—In the first place, my Lords, I strongly protest against the view of the Courts below of the words of the Act being taken as a literal view. The appellant has been (1.) interned, (2.) without a trial, (3.) because he is of hostile origin or associations. Parliament never said in words any one of those things. They are and are alone inferences—inferences from the delegation of a power, a power to make regulations for safety and defence. As to what may be done under such a power may be matter of far-reaching inference or wide and deep speculation, but these things do not touch the literal rule, the rule as to grammatical and ordinary sense of the actual words employed in the Act itself—the rule of Lord Wensleydale in *Grey v. Pearson*, (1857) 6 H. L. C. 61, 106. That rule does not go far in any case of difficulty; but, in so far as it may be held to have a bearing on this case, it leaves conspicuous force to the observation that if Parliament had really meant to sanction internment without trial for

the cause assigned it could have said so without the slightest difficulty, and not left a point which, I think, is so fundamental to be reached by inference.

I may add, my Lords, that, holding as I do that Parliament never intended to construct an instrument of violent and arbitrary power, but to do a much more helpful and reasonable thing, I should have come to the same conclusion even though the language had been much more plain and definite than it is. To adopt the familiar language of Lord Selborne in *Caledonian Ry. Co. v. North British Ry. Co.*, (1881) 6 App. Cas. 114, 122, 'The more literal construction ought not to prevail, if . . . it is opposed to the intentions of the Legislature, as apparent by the statute; and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated.' I refer also on this head to the judgments of Jessel M.R. and James L.J. in *Ex parte Walton*, (1881) 17 Ch. D. 746.

I turn from literal construction—which is not this case—to ask whether the construction of inference or implication is consistent with or repugnant to the rest of the Act? So consistent is the interpretation which I have ventured to put on the sub-section—namely, that regulations are the formulation of rules for the citizen's action and conduct, in obedience to which he shall be safe and in disobedience to which he shall on trial be punished—that all the rest of the Act fits in with this and makes the requisite provisions in great detail for trial and punishment accordingly. So repugnant is it to the interpretation finding favour in the Courts below—the interpretation that a power to issue regulations for safety and defence covers every power over the citizens which the Government may judge expedient for the object in view—that the entire remainder of the Act becomes surplusage. Everything could have been done by regulation. And indeed it does not stop there. For nine-tenths of the labours of Parliament are surplusage: all are covered by the same principle; all could be covered by 'regulations'. This construction humbly appears to me to be opposed to legal principle. Two constructions are available—one of harmony and consistency, the other of over-riding and repugnancy. In my view, in all such cases it is reasonable and according to law that the former be preferred.

Upon the last point—namely, that the construction upheld implies a repeal of the ancient liberties and rights of our people and of statutes both south and north of the Tweed which have been their protection in the enjoyment of these—your Lordships have already had a statement of my views. No repeal like this, or in this manner, at once so sweeping and so covert, has ever been accomplished in the modern history of this island. That Parliament should have entertained such an intention of repeal I do not believe; that it would have recoiled from putting such an intention of repeal into words I can well understand. The law on

such a subject is beyond doubt or question. Such an intention is the very last resort of a Court of construction.

Your Lordships have already heard my citation from Blackstone. It holds the field. It still represents, in my opinion, both the law of the land and the practice of the Constitution. Both may have been revolutionized by the stupendous repeal implied from the words of this Act. I do not think there is any such repeal, either in word, in implication, or intention.

In the latest edition of Maxwell on the Interpretation of Statutes, p. 268, I find the law exactly as I view it stated thus: 'Repeal by implication is not favoured. A sufficient Act ought not to be held to be repealed by implication without some strong reason. It is a reasonable presumption that the Legislature did not intend to keep really contradictory enactments in the statute-book, or, on the other hand, to effect so important a measure as the repeal of a law without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention.'

The construction I have ventured to propose appears to me to be not unreasonable, but to square with every familiar and accustomed canon. I think that the judgment of the Courts below is erroneous, and is fraught with grave legal and constitutional danger. In my opinion the appeal should be allowed, the regulation challenged should be declared *ultra vires*, and the appellant should be set at liberty.

LORD DUNEDIN, LORD ATKINSON, and LORD WRENBURY delivered judgments concurring with LORD FINLAY.

Order of the Court of Appeal affirmed and appeal dismissed with costs.

Note (a) to R. v. Halliday

LORD JUSTICE SCRUTTON said that . . . the Courts were always anxious to protect the liberty of the subject. They did so both in the interests of the subject himself and in the interests of the State. In time of war there must be some modifications in the interests of the State. It had been said that a war could not be conducted on the principles of the Sermon on the Mount. It might also be said that a war could not be carried on according to the principles of Magna Charta. . . .—*Ronnfeldt v. Phillips*, (1918) 35 T. L. R. at p. 47.

Note (b) to R. v. Halliday

Under circumstances such as these the notion that there is any effective presumption, that Parliament did not intend to interfere with the liberty or the property of the subject becomes so thin as to be

describable as the shade of a shadow, and disappears altogether when we find in the statute words which show that the legislature expressly authorized particular regulations which would of necessity restrict the liberty of the subject and his freedom to enjoy his normal rights over his real and personal property.—Per Greer J. in *Hudson's Bay Co. v. MacLay*, (1920) 36 T. L. R. at p. 475.

CHESTER v. BATESON, [1920] 1 K. B. 829

KING'S BENCH DIVISION

Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), s. 1:

'(1) His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm . . . and may by such regulations authorize the trial . . . and punishment of persons committing offences against the regulations and in particular against any of the provisions of such regulations designed . . . (e) to prevent assistance being given to the enemy or the successful prosecution of the war being endangered.'

Under this Act was issued the following regulation, (Defence of the Realm Regulations. 2 A (2)):

'If as respects any area in which the work of manufacturing, producing, repairing, storing, or transporting war material is being carried on, the Minister of Munitions is of opinion that the ejectment from their dwellings of workmen employed in that work is calculated to impede, delay, or restrict that work, he may by order declare the area to be a special area for the purpose of this regulation.

'Whilst the order remains in force no person shall, without the consent of the Minister of Munitions, take, or cause to be taken, any proceedings for the purpose of obtaining an order or decree for the recovery of possession of, or for the ejectment of a tenant of, any dwelling-house or other premises situate in the special area, being a house or premises in which any workman so employed is living, so long as the tenant continues duly to pay the rent and to observe the other conditions of the tenancy, other than any condition for the delivery up of possession.

'If any person acts in contravention of this regulation he shall be guilty of a summary offence against these regulations.'

The appellant having taken proceedings in order to recover possession of a dwelling-house which he had let to the respondent, a workman employed in the manufacture of munitions, at Vickers Ltd. at Barrow-in-Furness, the respondent submitted that inasmuch as the proceedings had been instituted without the consent of the Minister of Munitions, the jurisdiction of the justices was

ousted under the provisions of Defence of the Realm Regulations, 2 A (2). The appellant contended that this regulation was ultra vires the Defence of the Realm Consolidation Act, 1914. The justices were of opinion that the regulation was not ultra vires and that the consent of the Minister of Munitions was essential; but they stated a case for the opinion of the Court on the point of law involved.

DARLING J. This case came before this Court on a case stated by the justices sitting for the petty sessional division of Lonsdale North in Lancashire and after the argument for the appellant, the respondent not being represented, we reserved judgment.

This case raises the question whether reg. 2 A (2.) goes beyond the authority by the statute 5 Geo. 5, c. 8 confided to His Majesty in Council, to be exercised during the continuance of the present war for the defence of the realm. The words of that regulation are these: [*The learned judge read the regulation*]. The authority to make this regulation is to be found, if anywhere, in 5 Geo. 5, c. 8, s. 1, sub-s. 1, par. (e) in the words: 'Otherwise to prevent assistance being given to the enemy or the successful prosecution of the war being endangered.' It is objected that the regulation is bad because it forbids any person, without the consent of the Minister of Munitions, to take or cause to be taken any proceedings to recover possession of his own house, or to eject a tenant from it, where the tenant is employed in certain work connected with war material.

Mr. Langdon has contended that this regulation violates Magna Carta, where the King declares: 'To no one will we sell, to no one will we refuse or delay right or justice.' I could not hold the regulation to be bad on that ground, were there sufficient authority given by a statute of the realm to those by whom the regulation was made. Magna Carta has not remained untouched; and, like every other law of England, it is not condemned to that immunity from development or improvement which was attributed to the laws of the Medes and Persians. I found my judgment rather on the passage in *Rex v. Halliday*, [1917] A. C. 268, where Lord Finlay says that Parliament may entrust great powers to His Majesty in Council, feeling certain that such powers will be reasonably exercised; and, further, on these words of Lord Atkinson in the same case (*ibid.* 272):

'It by no means follows, however, that if on the face of the regulation

it enjoined or required something to be done which could not in any reasonable way aid in securing the public safety and the defence of the realm it would not be ultra vires and void. It is not necessary to decide this precise point on the present occasion, but I desire to hold myself free to deal with it when it arises.'

Here I think it does at last arise; and I ask myself whether it is a necessary, or even reasonable, way to aid in securing the public safety and the defence of the realm to give power to a Minister to forbid any person to institute any proceedings to recover possession of a house so long as a war worker is living in it.

The main question to be decided is whether the occupant is a workman so employed, and the regulation might have been so framed as to make this a good answer to the application for possession, still leaving that question to be decided by a Court of law. But the regulation as framed forbids the owner of the property access to all legal tribunals in regard to this matter. This might, of course, legally be done by Act of Parliament; but I think this extreme disability can be inflicted only by direct enactment of the Legislature itself, and that so grave an invasion of the rights of all subjects was not intended by the Legislature to be accomplished by a departmental order such as this one of the Minister of Munitions.

There are some instances in which Parliament has deliberately deprived certain persons of the ordinary right of citizens to resort to the King's Courts for the righting of alleged wrongs. The most notorious of these is the Vexatious Actions Act, 1896, which provides:

'It shall be lawful for the Attorney-General to apply to the High Court for an order under this Act, and if he satisfies the High Court that any person has habitually and persistently instituted vexatious legal proceedings without any reasonable ground for instituting such proceedings, whether in the High Court or in any inferior court, and whether against the same person or against different persons, the Court may, after hearing such person or giving him an opportunity of being heard, after assigning counsel in case such person is unable on account of poverty to retain counsel, order that no legal proceedings shall be instituted by that person in the High Court or any other Court, unless he obtains the leave of the High Court or some judge thereof, and satisfies the Court or judge that such legal proceeding is not an abuse of the process of the Court, and that there is prima facie ground for such proceeding. A copy of such order shall be published in the *London Gazette*.'

Let it be observed how carefully, even when so high an official as the King's Attorney-General intervenes, resort to the Courts of justice is preserved, and contrast this with the power of veto uncontrolled which is claimed for the Minister of Munitions.

This exceptional statute has been already enforced, as may be seen by reference to *In re Boaler*, [1915] 1 K. B. 21, 86. In giving judgment in that case, Scrutton J. used these words:

'One of the valuable rights of every subject of the King is to appeal to the King in his Courts if he alleges that a civil wrong has been done to him, or if he alleges that a wrong punishable criminally has been done to him, or has been committed by another subject of the King. This right is sometimes abused and it is, of course, quite competent to Parliament to deprive any subject of the King of it either absolutely or in part. But the language of any such statute should be jealously watched by the Courts, and should not be extended beyond its least onerous meaning unless clear words are used to justify such extension.'

It is to be observed that this regulation not only deprives the subject of his ordinary right to seek justice in the Courts of law, but provides that merely to resort there without the permission of the Minister of Munitions first had and obtained shall of itself be a summary offence, and so render the seeker after justice liable to imprisonment and fine. I allow that in stress of war we may rightly be obliged, as we should be ready, to forgo much of our liberty, but I hold that this elemental right of the subjects of the British Crown cannot be thus easily taken from them. Should we hold that the permit of a departmental official is a necessary condition precedent for a subject of the realm who would demand justice at the seat of judgment the people would be in that unhappy condition indicated, but not anticipated, by Montesquieu, in *De l'Esprit des Lois*, where he writes:

'Les Anglais pour favoriser la liberté ont ôté toutes les puissances intermédiaires qui formoient leur monarchie. Ils ont bien raison de conserver cette liberté; s'ils venoient à la perdre, ils seroient un des peuples les plus esclaves de la terre.' [Livre 2, c. 4.]

AVORY and SANKEY JJ. delivered concurring judgments.

Appeal allowed : case remitted to justices.

KRUSE v. JOHNSON, [1898] 2 Q. B. 91

QUEEN'S BENCH DIVISION

LORD RUSSELL OF KILLOWEN C.J. The county council of Kent, claiming to act under their statutory powers, made the following by-law. [*His Lordship read the by-law.*]¹

The appellant was summoned before the magistrates for offending against this by-law, when it was proved that on October 17, 1897, he persisted in singing in a public highway within fifty yards of a dwelling-house, after having been required by a police constable to desist. It was further proved by the occupier of the dwelling-house that the singing of the appellant and those with him was an annoyance to such occupier. The occupier had not, on the day in question, set the constable in motion, but he had on previous occasions complained to the police of the appellant's singing. The magistrates convicted the appellant, and against that conviction the present appeal is brought.

The question reserved for this Court is whether the by-law is valid. If valid, the conviction is to stand. It is objected that the by-law is ultra vires, on the ground that it is unreasonable and therefore bad. It is necessary, therefore, to see what is the authority under which the by-law in question has been made, and what are the relations between its framers and those affected by it.

But first it seems necessary to consider what is a by-law. A by-law, of the class we are here considering, I take to be an ordinance affecting the public, or some portion of the public, imposed by some authority clothed with statutory powers ordering something to be done or not to be done, and accompanied by some sanction or penalty for its non-observance. It necessarily involves restriction of liberty of action by persons who come under its operation as to acts which, but for the by-law, they would be free to do or not do as they pleased. Further, it involves this consequence—that, if validly made, it has the force of law within the sphere of its legitimate operation: see *Edmonds v. Master, &c., of the Company of Watermen and Lightermen*, (1855) 24 L. J. (M. C.) 124.

¹ 'No person shall sound or play upon any musical or noisy instrument or sing in any public place or highway within fifty yards of any dwelling-house after being required by any constable, or by an inmate of such house personally, or by his or her servant, to desist.'

In the present case we are dealing with a by-law made by a local representative body, namely, the county council of Kent which is created under the Local Government Act, 1888, and is endowed with the powers of making by-laws given to municipal corporate bodies under the Municipal Corporations Act, 1882.

Sect. 16 of the Local Government Act, 1888, provides that a county council shall have the same power of making by-laws in relation to their county as the council of a borough have in relation to their borough; and it further provides that s. 187 of the Public Health Act of 1875 shall apply to such by-laws. I will take these statutes in the order of time.

Sect. 182 of the Act of 1875 provides that all by-laws made by a local authority under that Act shall be under their common seal, and may be altered or repealed by a subsequent by-law; but no by-law shall be repugnant to the laws of England or to the provisions of the Act. Sect. 183 gives power to impose penalties. Sect. 184 provides that by-laws shall not take effect until confirmed by the Local Government Board, which may allow or disallow them, and before their confirmation notice of intention to apply for confirmation must be advertised, and for a month at least before such application a copy of the proposed by-laws must have been kept at the office of the local authority for the inspection of ratepayers, and the clerk of the local authority is bound to furnish on application a copy of the proposed by-laws, or a part of them, to any ratepayer on a certain payment being made. Sect. 23 of the Act of 1882 provides that the council of the borough may from time to time make such by-laws as to them seem meet for the good rule and government of the borough, and for the prevention and suppression of nuisances not already punishable in a summary manner, and they may, by such by-laws, appoint such fines, not exceeding 5*l.*, as they deem necessary for the prevention of offences against the by-laws. It is under this authority that the by-law in question was framed.

What are the checks or safeguards under which this very wide authority of making by-laws is exercisable? The same s. 23 further provides that no by-law can be made unless two-thirds of the whole number of the council are present; and, when so made, it shall not come into force until the expiration of forty days after a copy thereof has been fixed on the town hall; and it shall not come into

force until the expiration of forty days after a copy sealed with the corporate seal has been sent to the Secretary of State; and if within those forty days the Queen, with the advice of her Privy Council, disallows a proposed by-law or part thereof, such by-law, or such part, shall not come into force, and the Queen may, within the forty days, enlarge the time within which the by-law shall not come into force. We thus find that Parliament has thought fit to delegate to representative public bodies in towns and cities, and also in counties, the power of exercising their own judgment as to what are the by-laws which to them seem proper to be made for good rule and government in their own localities. But that power is accompanied by certain safeguards. There must be antecedent publication of the by-law with a view, I presume, of eliciting the public opinion of the locality upon it, and such by-laws shall have no force until after they have been forwarded to the Secretary of State. Further, the Queen, with the advice of her Privy Council, may disallow the by-law wholly or in part, and may enlarge the suspensory period before it comes into operation. I agree that the presence of these safeguards in no way relieves the Court of the responsibility of inquiring into the validity of by-laws where they are brought in question, or in any way affects the authority of the Court in the determination of their validity or invalidity. It is to be observed, moreover, that the by-laws having come into force, they are not like the Laws, or what were said to be the Laws, of the Medes and Persians—they are not unchangeable. The power is to make by-laws from time to time as to the authority shall seem meet, and if experience shews that in any respect existing by-laws work hardly or inconveniently, the local authority, acted upon by the public opinion, as it must necessarily be, of those concerned, has full power to repeal or alter them. It need hardly be added that, should experience warrant that course, the Legislature which has given may modify or take away the powers they have delegated. I have thought it well to deal with these points in some detail, and for this reason—that the great majority of the cases in which the question of by-laws of bodies has been discussed are not cases of by-laws of bodies of a public representative character entrusted by Parliament with delegated authority, but are for the most part cases of railway companies, dock companies, or other like companies, which carry on their business for their own profit, although incidentally for the advan-

tage of the public. In this class of case it is right that the Courts should jealously watch the exercise of these powers, and guard against their unnecessary or unreasonable exercise to the public disadvantage. But, when the Court is called upon to consider the by-laws of public representative bodies clothed with the ample authority which I have described, and exercising that authority accompanied by the checks and safeguards which have been mentioned, I think the consideration of such by-laws ought to be approached from a different standpoint. They ought to be supported if possible. They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who have to administer them that they will be reasonably administered: This involves the introduction of no new canon of construction. But, further, looking to the character of the body legislating under the delegated authority of Parliament, to the subject-matter of such legislation, and to the nature and extent of the authority given to deal with matters which concern them, and in the manner which to them shall seem meet, I think courts of justice ought to be slow to condemn as invalid any by-law, so made under such conditions, on the ground of supposed unreasonableness. Notwithstanding what Cockburn C.J. said in *Bailey v. Williamson*, (1878) L. R. 8 Q. B. 118, at p. 124, an analogous case, I do not mean to say that there may not be cases in which it would be the duty of the Court to condemn by-laws, made under such authority as these were made, as invalid because unreasonable. But unreasonable in what sense? If, for instance, they were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men, the Court might well say, 'Parliament never intended to give authority to make such rules; they are unreasonable and ultra vires.' But it is in this sense, and in this sense only, as I conceive, that the question of unreasonableness can properly be regarded. A by-law is not unreasonable merely because particular judges may think that it goes further than is prudent or necessary or convenient, or because it is not accompanied by a qualification or an exception which some judges may think ought to be there. Surely it is not too much to say that in matters which directly and mainly concern the people of the county, who have

the right to choose those whom they think best fitted to represent them in their local government bodies, such representatives may be trusted to understand their own requirements better than judges. Indeed, if the question of the validity of by-laws were to be determined by the opinion of judges as to what was reasonable in the narrow sense of that word, the cases in the books on this subject are no guide; for they reveal, as indeed one would expect, a wide diversity of judicial opinion, and they lay down no principle or definite standard by which reasonableness or unreasonableness may be tested.

[His Lordship considered the by-law in question, and continued:]

In my opinion, judged by the test of reasonableness, even in its narrower sense, this is a reasonable by-law; but, whether I am right or wrong in this view, I am clearly of opinion that no Court of law can properly say that it is invalid.

In the result the conviction appealed from must, in my opinion, be affirmed; but as the question is one of wide importance, and as to which there has been a contrariety of judicial opinion, it will be affirmed without costs.

Sir F. H. JEUNE delivered judgment to the same effect. MATHEW J. delivered a dissenting judgment. CHITTY L.J., WRIGHT, DARLING, and CHANNELL JJ. concurred in the judgment of LORD RUSSELL of KILLOWEN C.J.

Judgment for the respondent.

II

PREROGATIVE

15

A.

'By the word prerogative we usually understand that special pre-eminence, which the king hath, over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies, in it's etymology (from *prae* and *rogare*), something that is required or demanded before, or in preference to, all others. And hence it follows, that it must be in it's nature singular and eccentric; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer. And therefore Finch lays it down as a maxim, that the prerogative is that law in case of the king, which is law in no case of the subject.' (1 Bl. Com. 239.)

To Blackstone, the Prerogative consists of 'rights and capacities' which the Common Law recognizes as inherent in the King alone, and therefore out of its ordinary course as between subject and subject. A modern writer would be inclined to emphasize more than Blackstone had need to that the powers here in question are those enjoyed by the King at Common Law and not those conferred on him by statute. The recognition of such extraordinary 'rights and capacities' by the Common Law implies that the Common Law also defines their nature and extent. Such was the accepted doctrine of the Constitution in Blackstone's time, as it is at the present day; but when he wrote it had been universally accepted for less than a century. It was in the constitutional struggles of the Stuart period that the relationship between Prerogative and law was clearly established, and the principles of that settlement have endured with alterations only in detail up to modern times. The present theory of the Prerogative is substantially a legacy from the seventeenth century.

The issues contested in this struggle between Common Law and Prerogative therefore deserve the careful attention of the modern constitutional lawyer. At its outset the Stuart monarchs found themselves invested, in virtue of their regal dignity, with peculiar rights and capacities which may be classified in two broad divisions.

(1) The King's 'special pre-eminence' carried with it certain property rights which he enjoyed as feudal lord and conferred on

him certain advantages in litigation. Such had throughout the Middle Ages been the meaning generally, and almost solely, attached to the term Prerogative. The apocryphal statute *Praerogativa Regis*, in the thirteenth century, was wholly concerned with the King's exceptional rights as feudal lord. The chief among his advantages in litigation was that he could not be made defendant to an action at law; this was hardly a prerogative in the earlier Middle Ages since it was shared by other lords, being merely an application of the feudal rule that a lord cannot be sued in his own court. It later came quite correctly to be regarded as a prerogative; for when the King's courts had become national courts and absorbed in the greater part of the legal business of the country, the King's immunity ceased to have any real connexion with feudalism. It was further recognized that the King's goods and chattels were under no tribute, toll, or custom, nor otherwise distrainable. Such prerogatives as these were capable of full enumeration and description. They were that part of the Common Law which concerned the King, and could be discussed and applied by the Courts at Westminster Hall.

(2) But the Stuarts had also inherited from their medieval predecessors powers of government which were not so defined. True, the medieval lawyers had held the view that the law was a bridle on the King, and in their famous maxim, 'The King can do no wrong,' they had insisted that his power extended to do only what was right. They held, further, that the King could do certain things only in certain ways. He had irrevocably delegated to the common law Courts his power of deciding questions of freehold and felony and, save in so far as his hereditary revenue was concerned, he could not raise money by taxation without the consent of Parliament. But there was no doubt that the King had an unrestricted power to conduct foreign policy and to make war and peace, though he might in practice find himself powerless should Parliament refuse him the money necessary to carry his policy to a successful conclusion; and the King undoubtedly possessed an undefined residue of power which he might use for the public good. Thus although the plenitude of legislative power was in the King in Parliament, the King might issue proclamations in Council on his own authority, and to these was attributed a certain legal force, though one whose nature and extent were

subject to considerable doubt. So also he had a wide power to dispense with statutes where it was in the interests of justice so to do. As the fountain of justice, he was competent to decide cases which for some reason or other could not be efficiently dealt with in the Courts of Common Law; this power he might either delegate—his equitable jurisdiction in civil matters was delegated to the Chancellor—or retain, to be exercised by himself with the assistance of his Council.

Yet even in the exercise of his residuary powers he was considered to be subject to law. The power of supplementing and overriding positive law was given him, not that he might arbitrarily exert his own personal will, but that he might provide for cases where the positive law either was insufficient or worked injustice. Moreover, he was in practice dependent for the execution of his decisions on the co-operation of persons whom he could not effectively control. The characteristic vice of government in the later Middle Ages was not the arbitrary power but the executive weakness of the King.

At the end, therefore, of the fifteenth century, the King's power was of two kinds; the one he could exert only through certain recognized instruments, Parliament and the common law Courts, the other he could exert in person at his own discretion and subject to no restrictions of a formal or legal kind. Probably there was no clearly drawn distinction between the two categories. At least, the term *Prerogative* does not seem to have been used hitherto to distinguish discretionary powers from the rest, and on the rare occasions when medieval lawyers had applied it to the powers rather than the property rights of the King, it denoted the whole sum of authority inherent in and peculiar to him, whatever the mode of its exercise. In the sixteenth century, however, the extent of the King's discretionary powers attracted increasing attention. The Tudors, confronted by domestic and foreign dangers which called for instant and drastic action, used these powers with the utmost energy and added to their number. They were put into effect through instruments—Council, Star Chamber, High Commission—which were either new or had been renovated and strengthened, and the national peril induced a degree of acquiescence in their exercise which would have been impossible in the Middle Ages. Although the Tudors did not attempt to omit or avoid the normal exercise of royal authority through Parliament and the common law Courts,

discretionary action invaded every department of government, and might be considered the most significant feature of royal power. Around it, Tudor lawyers developed a doctrine of Prerogative which contained many elements of innovation.

Its enunciation involved at least a partial departure from the medieval theory of royal authority, which had seen in a king only a natural man—more powerful, no doubt, and more important than other men, but otherwise not different from them—which had refused to recognize in him any distinction between natural and politic capacities, had found in the law a bridle on his power, and had attached so vague a meaning to his Prerogative in government. To make such a departure openly was impossible. The medieval theory and the limitations it imposed still persisted and had not lost all their force. So the maxim of Continental absolutism, *Princeps legibus solutus*, never had any currency in England. No one dared openly to attribute omnipotence to the King as an individual. But the same result was achieved by gradual and circuitous means.

A distinction was drawn in the first place between the natural and politic capacities of the King, the latter of which was made the personification of the State. To his politic capacity were attached certain qualities which could not without absurdity be predicated of a natural man, such as perpetuity and perfection. The former of these qualities might be made to have its practical uses in obviating the difficulties caused by the demise of the Crown, though few practical consequences flowed from it. Clearly, however, the latter had the greatest immediate importance. It was expressed in the maxim that the King can do no wrong. This maxim lost its medieval significance and came to mean first that no intention of abusing his power can be attributed to him, and finally that whatever he does is right. The renewal at this point of the medieval injunction against separating the natural and politic capacities of the King resulted inevitably in the attribution to the monarch as an individual of the qualities of omnipotent and infallible sovereignty.

These were no empty claims. The activities of organs of government such as the Council and the Star Chamber had secured to the King an undisputed control of internal administration, besides that control of foreign policy and war which had always been his. To the Star Chamber the King's proclamations were a true source of law, his commands were to be obeyed under severe penalties.

The King's discretionary powers were unlimited in their own sphere, and had seriously invaded the territory of Parliament and the common law Courts. Over *matter of State* the ordinary Courts had no effective jurisdiction; the King made good his claim to distribute business between his Courts. It is not surprising that these discretionary powers should, under the name of his *absolute power*, have been contrasted with his *ordinary power*, exercised through Parliament and the common law Courts, or that some of them should have been regarded as *inseparable* from the Crown.

But the general acquiescence in the exercise of these powers depended on the tact and caution of the monarch. No systematic attempt was made earlier than James I to tax the subject without Parliamentary consent, and questions affecting his liberty and property were usually left to the common law Courts. Interference in such matters was reserved for cases of emergency.

Clearly this was a state of unstable equilibrium. Either the Courts must assert their independence of the King's absolute power, or the ordinary power, exercised by themselves or Parliament, would be swallowed up by it. The more extreme advocates of the Prerogative had no doubt that the King's absolute power overrode everything, but the cautious and gradual attacks of the Stuarts and the legal chicanery which they employed show that their more experienced advisers were by no means so sure of their position.

Likewise the more enthusiastic parliamentarians and common lawyers were on their side prepared to go to extreme lengths in their denial of royal absolutism, but the general mass of the legal profession, and the judges in particular, were somewhat perplexed as to the true solution of the problem. The Star Chamber and the Council had a clear-cut theory of the Prerogative. In the earlier years of the seventeenth century it was not clear that the doctrine of Prerogative held by the common law Courts would differ appreciably from that held by the Star Chamber.

On two points, but probably on these two points alone, a divergence had already occurred. Under the influence of Coke, the judges had given their opinion that the King had no legislative authority without Parliament (*Case of Proclamations*, p. 68 below), and that he could not judge except through the intermediary of his judges (*Prohibitions del Roy*, p. 276 below). Apart from its

expression in these two cases, that older theory of the royal Prerogative which accepted the existence of discretionary authority in the King but claimed to define its nature and extent never wholly disappeared. It was to form an indispensable link in the reasoning of Croke J.'s dissenting judgment in *R. v. Hampden*.

The conflict between these two rival theories of the Prerogative came to a head in relation to the claim of the King to levy taxation without the assent of Parliament. That was the key to the position. If the Crown made good its claim, it was really absolute; if it could not, it was at the mercy of Parliament, and was in danger of losing all the ground it had won during the last hundred and fifty years. It is not surprising therefore that the whole theory of Prerogative should have been discussed in the three cases now about to be described.

B.

BATES'S CASE, (1606) 2 St. Tr. 371

✓ An information was exhibited in the Exchequer against John Bates, a merchant trading to Venice and the Levant, for his refusal to pay a poundage of 5s. per cwt. on imported currants, which James I had by letters patent under the great seal imposed in addition to the statutory poundage of 2s. 6d. The arguments of counsel have not been preserved, but it appears that Bates, having paid the statutory poundage, refused to pay the new duty because it was imposed unjustly against the statute 45 Ed. 3, c. 4. which prohibited indirect taxation without the consent of Parliament. The decision of the Barons of the Exchequer was unanimous for the King, but only the judgments of Fleming C.B. and Clark B. are extant.

Both judgments, and particularly that of Baron Clark, place the decision for the Crown on high ground, and are remarkable for the sweeping dicta which they contain. Their general discussion of the Prerogative is quoted elsewhere in this work (p. 52 below). The royal revenues are asserted to be an inseparable Prerogative of the Crown: 'the revenue of the crown is the very essential part of the crown, and he who rendeth that from the king pulleth also his crown from his head, for it cannot be separated from the crown.' It is further stated that the King has power to place impositions on commodities produced and sold within the kingdom

as well as on those imported from abroad.¹ But the judgment proceeded mainly on lower and less controversial ground. 'All customs, be they old or new, are no other than the effects and issues of trades and commerce with forraign nations; but all commerce and affairs with forrainers, all wars and peace, all acceptance and admitting for current forrain coyn, all parties and treaties whatsoever, are made by the absolute power of the king.' The regulation of foreign trade is thus incident to the King's general control of foreign affairs. In the interest of the nation the King may prohibit the entry of foreign goods into the kingdom. If he may prohibit wholly, he may prohibit partly; 'by the same reason may he prohibite them, upon condition or *sub modo*, viz. that if they import such goods, that then they shall pay.' In virtue of this power the King had imposed the duty on the currants, when they were still in the hands of the Venetian merchants, so that Bates bought them already burdened with the duty; and since he will merely transfer the duty to the consumer, there is not, properly speaking, any charge whatever on Bates himself. Finally, since the king has this power to impose, he may impose whatever he deems advisable.

The gist of the decision was that the King might impose what duties he pleased if it was only for the purpose of regulating trade and not of raising revenue, and the Court could not go behind the King's statement that the duty was in fact imposed for the regulation of trade.

DARNEL'S, OR THE FIVE KNIGHTS' CASE, (1627) 3 St. Tr. 1

In 1626 letters under the privy seal were issued assessing certain individuals for contributions to a forced loan. Sir Thomas Darnel and four other knights refused to pay the sums demanded of them, and, on their appearing before the Council Board, were committed to the Fleet prison. Darnel obtained from the justices of the King's Bench a writ of habeas corpus directed to the Warden of the Fleet to show the cause of his imprisonment. The return made by the Warden stated that the prisoner was detained in his custody under a warrant from the Privy Council certifying that he had been

¹ The new duties imposed by the Book of Rates issued in 1608, which alarmed public opinion as the decision in Bates's Case failed to do, came within the field of this latter dictum.

committed 'by the special command of his majesty' (*per speciale mandatum domini regis*). Similar returns were made with respect to the other four knights.

The Attorney-General (Heath) expressly facilitated the representation of the prisoners by counsel, and the case was very fully argued at the bar. Counsel for the prisoners took objection to the returns as bad in form and substance. The former objection proceeds on technical grounds which need not here be discussed. The return, they urged, is also bad in substance because no cause of imprisonment is disclosed. The object of a writ of habeas corpus is that the court should be enabled to determine whether the cause of commitment be sufficient. Here that cannot be done. Magna Carta, and statutes of Edward III's reign, require that no man should lose his liberty save by due process of law and for some reason which the Common Law regards as sufficient. No reason is stated by the return, nor is a committal *per speciale mandatum regis* a committal by due process of law. If this return be accepted by the court, the King has an arbitrary power of confinement, which may be abused, and lead to perpetual imprisonments. One at least of the precedents adduced by counsel bore out the contention that the King's Bench had bailed prisoners alleged to be committed by the King's command—the case of *John Bildeston* (1844), in which the lieutenant of the Tower had returned that the prisoner was detained by the King's command under the great seal; the court bailed him *quia videtur curiae brevem praedictum sufficientem non esse*.

The Attorney-General, after meeting the objections made to the form of the return, argued that none of the statutes cited had any bearing on the present case. The King is *justiciarius regni*; 'all justice is derived from him, and what he doth, he doth not as a private person, but as the head of the common wealth.' Hence he has an absolute power to commit, from which there is no appeal, and such a committal is done *per legem terrae*, and is no violation of Magna Carta. The argument *ab inconvenienti* is disposed of first by reference to the even greater harm which might befall the state had the government no power of preventive arrest, and secondly by appeal to the doctrine that the King can do no wrong. Finally, the later precedents discussed turn more to the advantage of the King than of the prisoners. The 'resolution in Anderson' by which the judges in (?) 1591 had at least not disapproved such

returns as the present,¹ clinched Heath's argument, and largely decided the judgment of Hyde C.J., which was for the King. The prisoners were accordingly remanded into custody.

R. v. HAMPDEN (THE CASE OF SHIP-MONEY), (1637) 3 St. Tr. 825

In 1634, Charles I, being in need of a navy for the protection of English shipping, but unwilling to call a parliament, issued on the advice of Noy A.-G. writs commanding seaport towns to furnish ships fully manned and equipped, and instructing the municipal authorities to raise money from the citizens for that purpose. As the ships were too big for any town other than London to supply, the demand was equivalent to a demand for money. In 1635, on the advice of Finch C.J., writs for ship-money were again issued, but this time to inland counties also. Some resistance being experienced in the collection of the money, the judges were asked their opinion on the legality of the writs. They gave a favourable answer, and the next year writs were again issued similar to those of the year before. As the resistance to the writs increased, Charles put to the judges questions similar to those submitted previously to them.

The judges answered publicly as follows:

'We are of opinion, That when the good and safety of the kingdom in general is concerned, and the whole kingdom in danger, your majesty may, by Writ, under the Great Seal of England, command all the subjects of this your kingdom, at their charge, to provide and furnish such number of Ships, with men, munition, and victuals, and for such time as your majesty shall think fit, for the defence and safeguard of the kingdom from such danger and peril: and that by law your majesty may compel the doing thereof, in case of refusal or refractoriness. And we are also of opinion, That in such case, your majesty is the sole judge, both of the danger, and when and how the same is to be prevented and avoided.'

John Hampden, a Buckinghamshire gentleman, having been assessed to pay the sum of 20s., refused to pay. Proceedings were taken against him in the Court of Exchequer, and afterwards adjourned into the Exchequer Chamber, to be heard by all the common law judges.

¹ On 'the resolution in Anderson' see Holdsworth, H. E. L., vi. 32. There are several versions of the resolution. The effect of that most favourable to the prisoners is here stated.

The arguments, which are very long and difficult, may be summarized as follows:

ST. JOHN (for the defendant) admitted that the King has supreme power in matters relating to the defence of the realm, that every man is bound to share the burden, that the King is sole judge of dangers from foreigners, and when and how the same are to be prevented, and, finally, that the King may by writ command the inhabitants of each county to provide shipping for the defence of the realm. The question is only *de modo*.

He then enunciated the classical theory of the constitution, according to which all power flows from and is exercised by the King, but can legally be exercised only through certain instruments and under certain forms. As the King, though he is the fountain of justice, can administer justice only with the assistance of his judges, so he can take away the property of the subject only in parliament. Yet it is still the King who is *pars agens*, the rest of Parliament are but *consentientes*.

The King has revenues for the ordinary defence of the realm: these arise from the tenure of land, or from prerogatives or special sources such as the old customs, which are specifically allowed him for defence. Recourse must be had to ordinary means before extraordinary, but if the latter are necessary (and *salus populi suprema lex*) a parliament should be summoned. Among the *ardua regni negotia* for which parliaments are called, this of defence is the chief; the King may call a parliament when he pleases; parliament is best qualified to burden the subject, for its members know best the state of the realm, and for that each subject's vote is included in whatsoever there is done, it is fittest to preserve that fundamental property which the subject has in his lands and goods.

There is no other means by which it may be done. That the King cannot out of parliament take the subject's property is shown by the fact that in previous emergencies kings have asked parliaments for aids, or have raised money by loan, or have anticipated their rents. No king would have borrowed or asked money as a favour from the subject when he could have taken it of right. He cited several statutes, especially the Charter of William I, Magna Carta, the so-called statute *De Tallagio non concedendo*, those of 14 and 25 Ed. 3, and the Petition of Right, to prove the illegality of unparliamentary taxation.

Three objections may be raised. If the law entrusts defence to the King, it must give him money to pay for it. Answer: he is so nearly related to parliament that they are but one body; it cannot be presumed that parliament will not be willing to proportion the aid to the occasion. 2. Parliament moves too slowly to be consulted in an emergency. Answer: even in the Statute of Proclamations, 31 Hen. 8, which was made to provide for emergencies, power to tax by proclamation without parliamentary consent is expressly excluded. 3. Sometimes the existence of danger will justify taking the subject's goods without his consent. Answer: admitted, but this is only in case of immediate danger, when the necessity of self-preservation overrides all law. It is not a prerogative, but belongs equally to every subject, and cannot be used to justify an invasion of property except where the necessity is immediate. A similar right is admitted to exist while war is actually raging, but that is on the principle, *inter arma silent leges*.

He then discussed the precedents relating to ship-money, and contended that the Crown's position was no stronger than in the case of any other tax.

LITTLETON S.-G. (for the King) said the case did not involve a discussion whether the King could tax the subject except in an emergency. That he could not tax the subject in normal circumstances without the consent of Parliament was clear law. But in time of war, and when *salus populi* was at stake, private property must give way to the common good. *Quod necessitas cogit, defendit*. And this not only when war is actually raging, but also upon rumours of wars. Matters of war and peace are for the King; sometimes dangers are not fit to be communicated to the people, and yet it is very fit that preparation be made beforehand.

He then quoted authorities in support from almost every reign down to that of James I, observing that some, concerning *Jus Publicum*, come not into ordinary debate, but remain '*inter arcana Imperii*'.

He answered St. John's argument: It is not true that the King may act only through certain instruments and under certain forms. The King can judge in his own person. 'Can that be wanting in the fountain that issues in the stream?' So of ship-money, 'it doth not follow, because he may do it in parliament, that therefore he can do it no where else.' There is no authority for saying that the

King's ordinary revenues are to be used for the defence of the realm.

'The subject hath a double protection from injury and wrong, in times of peace by his laws, and in times of war by his power: must this be done by the king's single person? No, it must be done by the bodies of his subjects at their charges. Indeed it is fit that particular soldiers should be paid.—Oh! but they tell us, that Fortescue, Chief Justice of the King's-Bench, to shew the law of England to be better than the law of France, saith, that nothing could be taken from the subjects but by parliament. That is in the ordinary way; doth he say, that no man shall contribute to defend himself in imminent danger? "*Ne verbum quidem.*"

'This is a pretty thing that the king is to direct the war, and yet shall have neither men nor money without asking his subjects leave.' The calling of a parliament is often inconvenient and always slow. The time of election, assembling and deliberation must be added to that taken to collect the money.

The statutes quoted by the defence are either defective or not to the point.

HOLBORNE (for the defendant) refused to admit that the King's allegation of imminent danger was conclusive, and contended that the allegation was not clearly set out on the face of the writ. He then repeated many of St. John's arguments. The King may not out of Parliament charge the subject, and he is himself to be at the charge of defence; he has money for the purpose.

His reasons were two. 1. Starting from Fortescue's description of the King as ruling not only regally but also politically, he says there is a policy of England in the necessary attendance of advice in parliament. As to this advice political, if the king can charge the subject alone, though in pretence for common good, his successors may do it on any occasion, and then, what is become of the policy for which the political advice was made attendant to the regal power. [*To state this argument in the language of the twentieth century, parliament is established to limit the power of the king; how can it do so, if he may tax whenever he chooses to allege the existence of an emergency?*] 2. The subject has a property in his goods. How can any one charge it? Mr. Solicitor says this must give way where there is an extraordinary danger, but this distinction between ordinary and extraordinary dangers destroys the whole frame of political government. The King cannot be allowed the power of

deciding when he will or will not charge the subject, for the power is, under a bad king, liable to abuse. If it be said, the King can do no wrong, that proves that it is possible for a governor in his inclination to incline to wrong, and therefore the law has taken a care that he should do none; which is not a disability in the king, but a prerogative, to make him come nearer to the quality of divinity. [*The modern counterpart of this argument would be that the law will not give him a power which he might be tempted to use to interfere wrongfully with the property of the subject.*] He is said, it is admitted, to judge of the necessity, but 'in judgment so to do it, is all one as to leave it to him arbitrarily, if he will, which is that only which was intended to be prevented.'

It is admitted that the subject must serve in case of necessity, but only in person; if his goods are to be taken the necessity must be immediate, and mere rumours of wars or apprehension of danger are not enough.

BANKS A.-G. (for the King) repeated and classified the arguments of Littleton as follows:

1. The King, as an absolute king, possesses certain *jura summae majestatis*, including dominion, that is, property, over his realm, the right of executing justice, of pardon, of war and peace. On all these matters his decision must be conclusive.

2. In the exercise of these rights he has no need of parliaments. There was a King before parliaments. If the king may act without parliament under normal conditions, *a fortiori* in an emergency.

3. The titles by which the King is known show that he has this power. He is *medicus regni* (11 Co. Rep. 70 b). It is the part of a good physician, as well to prevent diseases, as to cure them; and the office of a good king, as well to prevent danger, as to remedy it.

4. Precedents:—(a) Previous writs have not been grounded on particular customs, but on the law of the land.

(b) They were issued on the authority of the King alone, without consent of Parliament. It has been suggested that, as many of them date from the thirteenth and fourteenth centuries, there has been a discontinuance, and the right has become obsolete. But *nullum tempus occurrit regi*. Also, the right only exists, *ex hypothesi*, in an emergency, and emergencies are not everyday occurrences.

(c) These writs have gone forth, not only in cases of actual war or invasion, but by way of preparation beforehand.

(d) They have been issued without parliamentary consent, even when parliament was sitting.

(e) They are not confined to ports or seaboard counties but have gone to inland counties as well.

(f) In many cases no cause has been shown on the face of the writ. Nor was there need, for the King is sole judge of the necessity.

5. It is objected that there was time for assembling a parliament; the time allowed for payment showed that there was no urgency. But there would have been still greater delay if the King had had to wait for the consent of parliament. Moreover, at the time of the Spanish Armada preparations were made long beforehand, yet there was no parliament summoned.

6. Of the statutes quoted against us, the Petition of Right is only declaratory of the existing law, and adds nothing. If previous kings have asked for aids, that was purely a matter of grace, and cannot be construed as a precedent.

Seven judges, Crawley, Berkeley, Vernon and Jones JJ., Weston and Trevor BB., and Finch C.J. found for the King; two, Davenport C.B. and Bramston C.J. for the defendant on technical grounds; Croke and Hutton JJ. and Denham B. substantially for the defendant. It is worthy of remark that on the whole the older judges decided for Hampden, the younger judges for the King. The judgments vary considerably in tone; Finch C.J. is the most extreme, Berkeley J. the next, but there are many interesting reservations in his argument which are effectually though not avowedly cancelled by his succeeding remarks. It must be remembered that Hampden by demurring rendered it impossible for his counsel to argue that the charge, so far from being justified by the existence of a state of emergency, had become a regular tax. Even Holborne, who refused to accept the King's allegation that there was a state of emergency, did so by analysing the writ itself. If Hampden had pleaded instead of demurring, i.e. had objected in point of fact rather than law, he could not have raised the point of law, nor, probably, would the King have allowed the case to come before a Court of Common Law. There is therefore no legal force, though there may be great practical force, in Gardiner's remarks (*Hist. Eng.* ix. 61) that

'Lyttelton's argument would have been an excellent one if it had had the slightest relation to the circumstances of the case. . . . No such

excuse could be pleaded on behalf of an exaction which was now being renewed for a fourth annual period.' Or again 'Bankes . . . was totally unable to show anything like a general contribution enforced from year to year.'

He was not concerned to do so: Hampden's demurrer had relieved him of the necessity. The issue was quite clear: if in a single instance the King apprehends danger from the sea, can he demand ship-money? The only duty of the court was to determine it.

On the whole the judgments followed the general line of the arguments on either side. Those for the King run usually as follows.

The King has sole charge of the defence of the realm. But '*regula iuris lex est, quando quis aliquid alicui concedit, concedit et id sine quo res ipsa non potest.*' The King then must have a revenue, and it must not be dependent upon anybody's consent. But it is a maxim of equity that '*Quod omnes tangit per omnes debet supportari.*' It must therefore be possible for the King to charge his subjects. No doubt in normal circumstances he cannot do so without the consent of Parliament, but if an emergency occurs, there is no time to summon a parliament, and the King must act alone. If reliance is placed on medieval statutes which prohibit unparliamentary taxation, it must be answered that the King has an inseparable prerogative to defend the realm, and any statute which attempts to deprive him of it is void; the same of the revenue needed for the purpose. If it is said that the danger must be imminent, and that then any man may act for himself, we answer that there are precedents for action by the King while the danger is still only apprehended, and it is clear that prevention is better than cure.

There most of the judges stop. Weston B. even suggests that if it were done in parliament it were done well. The majority are content to allow the King power to act alone, and to applaud its use in the circumstances. Berkeley J., after making in the first general head of his argument the fullest acknowledgement of the exclusive right of Parliament to tax in normal times (see p. 50), denies violently in his second general head Holborne's contention that in case the King should be inclined to exact from his subjects at his pleasure, he should be restrained, for that he could have nothing from them but upon a common consent in parliament. And then he says in a famous passage:

'I never read nor heard, that *Lex was Rex*; but it is common and most

true, that Rex is Lex, for he is "lex loquens," a living, a speaking, an acting law: and because the king is "lex loquens," therefore it is said, that "rex censetur habere omnia jura in scrinio pectoris sui." (p. 1098.)

How can these two apparently contradictory doctrines be reconciled? We can only reconcile them if we realize that the two parts of his argument deal with two entirely different matters. The first relates to the property of the subject; the second to 'the fundamental policy, and maxims, and rules of law, for the government of this realm.' We shall see that this is an application of a distinction familiar to lawyers of the period, between *government* and *property*, between public and private law, and it must be presumed that when Berkeley J. is speaking in this extreme manner, he is speaking of the King's power so far as it was a matter only of public law. In overlooking this distinction, historians and even lawyers have sometimes treated Berkeley unfairly; they have omitted that which gives coherence to his argument as a whole and moderates the apparently extreme language in which the second part is expressed. But of course so clever a man must have recognized that his first reservation, that the property of the subject could not be taken from him in normal times without the consent of parliament, must be nugatory if these claims for the Crown in matters of government were allowed to pass.

Finch C.J. less tactfully but more honestly dotted the i's and crossed the t's of his argument, and enunciated a theory of almost pure absolutism. 'A parliament is an honourable court,' he says,

'and I confess it an excellent means of charging the subject, and defending the kingdom; but yet it is not the only means. . . . I wish that some, for their private humour, had not sowed the tares of discontent in that field of the commonwealth, then might we have expected and found good fruit. But now the best way to redeem this lost privilege (for which we may give those thanks only) is to give all opportune appearance of obedience and dutifulness to his majesty's command. The two houses of parliament without the king cannot make a law, nor without his royal assent declare it: he is not bound to call it but when he pleaseth, nor to continue it but at his pleasure. Certainly there was a king before a parliament, for how else could there be an assembly of king, lords and commons? And then what sovereignty was there in the kingdom but this?' (p. 1226). 'But I hold parliaments are the excellent means to raise aid for the defence of the kingdom, and yet they are not the only

means, for then the parliament, and not the king, should be the only judge, and have the defence of the realm; or else it should give the king a charge of defence, without power or means' (p. 1235). 'Acts of parliament may take away flowers and ornaments of the crown, but not the crown itself; they cannot bar a succession, nor can they be attained by them, and acts that bar them of possession are void. 2. No act of parliament can bar a king of his regality, as that no lands should hold of him; or bar him of the allegiance of his subjects; or the relative on his part, as trust and power to defend his people: therefore acts of parliament to take away his royal power in the defence of his kingdom, are void (as my Lord Chief Baron said;) they are void acts of parliament, to bind the king not to command the subjects, their persons and goods, and I say their money too: for no acts of parliament make any difference' (p. 1235).

Croke J. argued for Hampden as follows:

'1. I hold that this writ is not allowable by the common law, but is a writ absolutely against the common law. It is against the common law of the land, which gives a man a freedom and property in his goods and estate, that it cannot be taken from him, but by his consent in specie, as in parliament, or by his particular assent: for the law puts a difference between a freeman and bondman. A bondman's goods may be taken without his consent; but not so of a freeman.

'2. Admit it was good at common law, yet it is against divers statutes. These are not temporary, as has been suggested, but perpetual. Though it would be a void statute that would forbid the king to defend the realm, yet the king may by parliament restrain himself from laying such a charge but by consent in parliament.

'3. I hold, that no necessity, nor no pretence of danger, can give this cause for the writ: for if the writ be against the common law, no pretence of danger can warrant it. Mens persons may be used in the case of necessity or danger; for every man is bound to defend the kingdom, but no necessity can procure this charge without a parliament. The law provideth a remedy, in case of necessity and danger; for then the king may command his subjects, without parliament, to defend the kingdom. How? By all men of arms whatsoever, for the land; and by all ships whatsoever, for the sea, which he may take from all parts of the kingdom and join them with his own navy.

'4. There is no warranty by prerogative of the crown, nor power royal, for this writ. The law hath that honourable conceit of the king, "That he can do no wrong." A king, therefore, to have a royal power or prerogative to do that by his writs, to command anything to be done that is against the express laws of the kingdom, to the infringing of the liberties of his subjects, is not admitted by the law.

'5. That this writ is the first writ that ever was devised in this

kind, and first put in practice, either in inland counties or maritime parts.

'6. That there is not any one precedent, nor any one record judicial, or judgment in point of law, for the writ; if not, then I hold it not fit to be maintained.' (p. 1128.)

C.

To the modern lawyer these cases wear an exotic look; they are in truth the products of a jurisprudence which the Long Parliament swept away. The judges who decided them have been denounced as time-servers or traitors, but it is by no means certain that they decided contrary to law. It has indeed long been recognized that the decisions in *Bates's Case* and *Darnel's Case* were perfectly sound. The former won universal approval at the time among men learned in the law; the imposition was really levied, as was alleged, for the regulation of trade and not for revenue purposes, and it was not until James used the decision to justify taxation for revenue that complaints began to be heard.¹ The imprisonment sanctioned in *Darnel's Case* was undoubtedly a naked abuse of power, but the Court had no jurisdiction to go behind the return.

The *Case of Ship-Money* causes much more serious difficulties. The King's case had no merits. The whole affair was clearly an ingenious conspiracy to levy taxation without parliamentary consent. The judges were hardly free agents; even so, only a bare majority gave judgment for the King, while some of the reasons given for the decision were fantastically extravagant. It is not until the arguments of counsel are read, and full account is taken of the admissions made by both parties that it becomes apparent that the defendant had not all the law on his side. The prohibition of taxation in the Petition of Right has appeared to many conclusive against the claims of the King. All one can say is that Hampden's counsel do not seem to have thought so. The Petition of Right plays a much smaller part in their argument than one would have expected. Besides the Tudor precedents are not easily

¹ It should be noted, however, that even before judgment had been delivered in *Bates's Case*, the Lord Treasurer (Dorset) had conferred with the judges, ascertained that they intended to decide for the King, and arranged that they should deliver fully-reasoned judgments, so as to provide 'a settled and an assured foundation for the King's impositions for ever.' (Gardiner, *Hist. Engl.* ii. 7, note 1.)

disposed of. And it was difficult, having admitted the King's duty to provide for the defence of the realm, and his sole competence to judge when the realm was in danger, to deny him the wherewithal for defence. Granting to the full the seventeenth-century love of subtle learning, one finds it hard to suppose that so complicated an argument as St. John's would have been put forward, had the case been so simple as we are apt to presume.

Everything points to the probability that neither the argument which immediately nor that which ultimately prevailed represented completely the facts of the Constitution as it then stood. It would have been surprising had either done so, for there were many inconsistencies which could not be reconciled with the modern theory of sovereignty, towards which men were feeling their way. Neither side seems to go far enough; the admissions are surprisingly large. On the other hand, the royalist judges appear to have considered it their duty, even when there was a perfectly valid narrow ground for their decision, to generalize in a spirit of absolutism, in the hope, perhaps, that it would be impossible in later cases to distinguish between dictum and ratio decidendi.

The same views are put forward in all three cases. There is no essential difference between the views expressed in *Bates's Case* and those of Berkeley J. or Crawley J. in *Hampden's Case*, and those of Finch C.J., if more extreme, are logical deductions from the arguments of his brother judges. St. John also, though he must have been acquainted with Whitelocke's exposition of the doctrine of Parliamentary sovereignty in the Commons' debate on impositions in 1610, argued on lines which much more closely resemble those of Hakewill's narrower treatment of the topic on that occasion. There is curiously little development on either side, and the point at issue, though of the utmost importance, is of the narrowest.

There was no question, on the part of the Parliamentary lawyers, but that the King had sole charge of foreign affairs, and the defence of the realm. No one suggested that the government of the country belonged to any one else. Parliament neither at that nor at any subsequent time, except during the revolutionary period from 1642 to 1660, claimed to govern the state; at this time all it demanded was the right to complain and interfere, if it disapproved of the policy of the King or the particular servants he employed. But in fact the Parliamentary lawyers found it difficult, having gone so far, to deny that the King had the best

means of knowing about foreign affairs, and was the fittest person to judge of an emergency.

Of the royalist lawyers, only Finch C.J. denied that in normal circumstances taxation could be legally imposed only with the consent of Parliament. Even Berkeley J., whose views are quite extreme, admits the exclusive right of Parliament in this respect.

‘I hope that none doth imagine, that it either is, or can be drawn by consequence, to be any part of the question in this case, whether the king may at all times, and upon all occasions, impose charges upon his subjects in general, without common consent in parliament? If that were made the question, it is questionless, That he may not. The people of the kingdom are subjects, not slaves, freemen, not villains, to be taxed *de alto et basso*.

‘Though the king of England hath a monarchial power, and hath “*jura summae majestatis*,” and hath an absolute trust settled in his crown and person, for government of his subjects; yet his government is to be “*secundum leges regni*.”—It is one of the questions in the “*juramentum regis*,” at his coronation, (see the old Magna Charta, fol. 164.) “*Concedis justas leges et consuetudines regni esse tuendas?*” And the king is to answer, “*Concedo*.”—By those laws the subjects are not tenants at the king’s will, of what they have.—They have in their lands “*Feodum simplex*,” which by Littleton’s description is, “*hæreditas legitima, vel pura*.”—They have in their goods a property, a peculiar interest, a “*meum et tuum*.” They have a birthright in the laws of the kingdom. No new laws can be put upon them; none of their laws can be altered or abrogated without common consent in parliament.

‘Thus much I speak to avoid misapprehensions and misreports upon that which I shall say in this case; not as if there were cause of saying so much upon anything challenged on the king’s side. We have in print his majesty’s own most gracious Declaration, that it is his maxim, that the people’s liberties strengthen the king’s prerogative, and that the king’s prerogative is to defend the people’s liberties.’ (p. 1090.)

Jones J., who also gave judgment for the King, adds:

‘I was a member in the parliament, and was in the lower house when Cowel was sentenced. I will tell you what Dr. Cowel did: he wrote a book, and under the words Prerogative, Subsidies, and Kings, he inferred as if the king might make laws without consent in parliament; and wrote against the common law, which the king is sworn to maintain; thereupon he was sentenced, and his sentence was just, and I gave my voice for it. The other was Dr. Manwaring, he preached two Sermons that the king was not bound to observe his laws, but the right and liberty of the subject are at the king’s will and pleasure without parlia-

ment, and that this doth bind the conscience of the subjects, and that they are bound to pay Loan-Money upon pain of eternal damnation; and that they that did refuse to pay the Loan-Money, did offend against the laws of God, and were guilty of disloyalty and disobedience; and that the authority of parliaments was not necessary to the granting of any subsidy. For this he was sentenced, and made his submission.' (p. 1189.)

The Crown lawyers merely contended that the prohibition of unparliamentary taxation did not apply to emergencies. One judge, Weston B., argued to this effect from the omission in the medieval statutes and the Petition of Right of any specific reference to the defence of the kingdom, an argument for which a modern parallel may be found in the judgment of the Privy Council in *Fort Frances Pulp Co. v. Manitoba Free Press Co.*, [1928] A. C. 695. But he also enunciated the doctrine that Acts of Parliament must give way to necessity; for instance, 'if a man be attainted of treason, he is disenabled to inherit by act of parliament; but if the kingdom should descend to such a man, then the act of parliament should give way to it. And shall not the acts of parliament give way to necessity for defence of the kingdom?' (p. 1075). This the other side admit; the only question is, what degree of necessity, immediate or apprehended? Other judges say, 'You cannot bar a king of his regality' (Finch C.J. (p. 1235)), or 'Special words in an act of parliament could not take away his prerogative, because it would have been an act against reason' (Jones J. (p. 1190)). This seems to us the language of a knave or a fool, but Croke J., who was on the other side, admits that 'if a statute were, that the king should not defend the kingdom, it were void, being against law and reason,' and Hutton J., who gave judgment to the same effect, said,

'I confess there are some inseparable prerogatives belonging to the crown, such as the parliament cannot sever from it. And I will prove to you out of books, cases and statutes, that the king cannot release his tenure *in capite*. It was endeavoured that a law should be made that the court of wards should be shut up, it was resolved it had been a void law; such is the care for the defence of the kingdom, which belongeth inseparably to the crown, as head and supreme protector of the kingdom: So that if an act of parliament should enact that he should not defend the kingdom, or that the king should have no aid from his subjects to defend the kingdom, these acts would not bind, because they would be against natural reason. But in our case here, there is no such

thing; for there is no act that restrains the king to lay any charge at all, but only ties him to one means, by which he would come by it, to wit, by parliament.' (p. 1194.)

There was then a fair consensus of opinion that the Prerogative did not extend to taking away the property of the subject except in emergency. All were agreed also that the conduct of government lay with the king, and moderate men were probably prepared to admit, that so long as a king existed, he must have certain prerogatives, which could not be taken away from him. Both Fleming C.B. in *Bates's Case* and Whitelocke in the debate of 1610, and everybody concerned in the *Case of Ship-Money* could have concurred in Bacon's analysis:

'I consider,' says Lord Bacon, 'that it is a true and received division of law into *ius publicum* and *ius privatum*, the one being the sinews of property, and the other of government.' (Lord Bacon, *Preparation towards the Union of Laws, Works*, vii. 731, quoted by Holland, *Jurisprudence*, 13th ed., p. 366.)

Fleming C.B. in a famous passage says:

'And first, for the person of the king, "omnis potestas à Deo, et non est potestas nisi pro bono." To the king is committed the government of the realm and his people; and Bracton saith, that for his discharge of his office, God hath given to him power, the act (*sic*) of government, and the power to govern. The kings power is double, ordinary and absolute, and they have several lawes and ends. That of the ordinary is for the profit of particular subjects, for the execution of civil justice, the determining of *meum*; and this is exercised by equitie and justice in ordinary courts, and by the civillians is nominated *jus privatum* and with us, common law: and these laws cannot be changed, without parliament; and although that their form and course may be changed, and interrupted, yet they can never be changed in substance. The absolute power of the king is not that which is converted or executed to private use, to the benefit of any particular person, but is only that which is applied to the general benefit of the people, and is *salus populi*; as the people is the body, and the king the head; and this power is [not] guided by the rules, which direct only at the common law, and is most properly named Pollicy and Government; and as the constitution of this body varieth with the time, so varieth this absolute law, according to the wisdom of the king, for the common good; and these being general rules and true as they are, all things done within these rules are lawful.' (*Bates's Case*, (1606) 2 St. Tr. at p. 389.)

As we shall see later (pp. 58-9 below) there is no true distinction in modern English law between public and private law, for,

since the abolition of the Court of Star Chamber both have been administered in the same courts; and the absence of this distinction, which is a marked feature of most continental systems of law, is commonly looked upon as a symbol of English liberty. But in 1610 the parliamentarians had apparently no objection to the then existing state of affairs. Nor did they object to the term absolute power; to them it meant a power which the king could use as he pleased, or, as Professor Holdsworth has said, in the exercise of which he had an absolute discretion. In this sense of the term all the Prerogative which consists in powers of government, and not mere fiscal rights or advantages in litigation, is still absolute. Once the King is allowed to possess a prerogative, he may, so far as the law is concerned, exercise it as he likes. The only control is political, through the responsibility of ministers to the House of Commons.

But when the Royalists said that one part of the Prerogative was absolute, they sometimes meant that the King had a general overriding power which he could use at his discretion whenever the government of the country required it. There seems to be an inherent logical difficulty in conceiving of a power to be exercised without restriction within a restricted sphere. This corresponds to the practical difficulty of preventing the repository of a power from abusing it in such a way as to transgress its limits. So the King may be found claiming that not merely his exercise of his Prerogative, but the Prerogative itself, is absolute, i. e. unrestricted. That view is expressed in some of the judgments in the *Ship-Money Case*. It harmonized well with the new meaning given to the maxim, 'The King can do no wrong.'

The struggle in *Darnel's Case* and *Hampden's Case* was really the same. The prize was the debatable ground between *property* and *government*, (using these terms in the sense defined above). Taxation as a general rule belonged to the former. But if, in the one case, the King could imprison anybody who refused to contribute to a forced loan, or, in the other, could levy direct taxation by Prerogative whenever he chose to allege the existence of a state of emergency, it was clear that he could dispense with parliaments altogether. Property would have been swallowed up by government. If on the other hand, he failed, then in the long run Parliament could, by its control of the purse-strings, control the government of the country. The theory of the Tudor constitution had

been that the King should govern, but Parliament should tax. The system for several reasons proved unworkable under the Stuarts, and both parties tried to encroach on the other's preserves. Both found an opportunity because they held certain territory in common, and each looked upon the other as a usurper, as indeed he was. The mere fact that Parliament won should not blind us to the fact that in strict law it had no better case than the King. These cases had, in view of the conflict of authorities, to be decided on grounds of public policy, and everything depended on who had such a control of the courts as to ensure that his ideas of public policy should prevail. If it was no part of the Tudor theory of government that emergency powers should be used for the raising of revenue, neither was it a bona fide use of the power of the purse to attempt to remove foreign policy or the defence of the realm from the hands of the Crown.

D.

Much of the contents of the Prerogative perforce disappeared when the Star Chamber was abolished. They could not be exercised without the intervention of a court. The prerogative of executing martial law, at any rate in time of peace, had already been taken away by the Petition of Right; so had the power to commit *per speciale mandatum regis*. The decision in *R. v. Hampden* had been reversed by a special Act. The Crown still had full legal control of foreign policy, and prerogatives such as the power of dissolving parliament, of appointing to offices and of pardon. But these prerogatives could not affect the property of the subject. And from the time of the Long Parliament it had been clear that wherever any prerogative came into conflict with the exclusive right of Parliament to tax, it must give way to it.

There was one doctrine of the Prerogative and one prerogative right which were dangerous to Parliament, and were not yet dead. Nothing had been done directly to kill the notion that certain prerogatives were inseparably annexed to the Crown, so that no statute could avail to take them away, and no attempt had been made to destroy the dispensing power. The Restoration period, and especially the reign of James II, showed that unless Parliament could contrive to advance still farther, all was not irreparably lost to the Crown. By means of dispensations, the King could legalize anything which was not *malum in se*, provided his dis-

dispensation deprived no third party of his rights; that is to say, his dispensing power would have no effect where property or private law was at stake, but could be used to evade a statute which expressed the wishes of Parliament on a point of public law. Moreover, because the prerogative to dispense with statutes was looked upon as inseparably annexed to the Crown, there was no means of curbing the power of a king who did not owe his authority and even his title to Parliament.

GODDEN v. HALES, (1686) 11 St. Tr. 1165

The defendant, as colonel of a regiment of foot, was obliged by the Test Act 25 Car. 2 to receive the sacrament as the Act directed and to take the oaths of allegiance and supremacy within three months of being admitted to his charge. This he neglected to do, and was tried and convicted at the Kent assizes, whereupon the plaintiff as informer became entitled to a sum of £500 to be forfeited by the defendant for his breach of the Act; to recover which sum the present action of debt was brought. The defendant pleaded that within three months of his appointment and before the suit began, the King (James II) had by his letters patent under the Great Seal dispensed him from taking the oaths and other obligations imposed by the Test Act. The question was whether the dispensation was a good bar to the action.

The decision of Lord Chief Justice Herbert and of ten of the other eleven judges, (*Street dissentiente*), was

- ‘1. That the kings of England are sovereign princes.
2. That the laws of England are the king’s laws.
3. That therefore ’tis an inseparable prerogative in the kings of England, to dispense with penal laws in particular cases, and upon particular necessary reasons.
4. That of those reasons and those necessities, the king himself is sole judge: and then, which is consequent upon all,
5. That this is not a trust invested in, or granted to the king by the people, but the ancient remains of the sovereign power and prerogative of the kings of England; which never yet was taken from them, nor can be. And therefore such a dispensation appearing upon record to come time enough to save him from the forfeiture, judgment ought to be given for the defendant.’

The decision can be upheld on less extravagant grounds, as

was done by Herbert himself in the vindication of his judgment which he published later. He follows Y. B. 11 Hen. VII, fol. 11-12, in distinguishing between that which is *malum in se* and that which is merely *malum prohibitum* by statute. With the former the king can never dispense, though he may afterwards pardon. Herein lies the difference between a dispensation and a pardon. 'For a dispensation does *jus dare*, and makes the thing prohibited (to all others) lawful to be done by him that has it. And therefore the king cannot dispense with *malum in se*, because they never were, and never can be, made lawful: but even these (says the Year-book) may be pardoned after they are done.' The result is that 'whatever is not prohibited by the law of God, but was lawful before any act of parliament made to forbid it, the king, by his dispensation, granted to a particular person, may make lawful again, to that person who has such dispensation, though it continues unlawful to every body else. But to execute any office without taking the oaths and the tests antecedent to any acts of parliament made to forbid it, was lawful. Therefore the dispensation granted to sir Edward Hales did make it lawful for him to do so, though it continued unlawful for any body else.'

The chief authority cited for this contention is the resolution of the judges in 2 Hen. VII, that though the statute 23 Hen. VI c. 8 makes void all patents to hold the office of sheriff for more than one year and enacts that the king shall have no power to dispense with it, nevertheless the king may issue patents for longer periods for reasons of which he is the sole judge. All the versions given of that resolution lead to the conclusion that the case was on all fours with the present case. It further appears from Coke that the king's power of dispensing with statutes which restrain him in granting offices stands on a peculiar footing. 'For that the act could not bar the king of the service of his subject, which the law of nature did give unto him.' By parity of reasoning, the King may dispense with the Test Act, which by necessary consequence if not directly deprives him of the service of some of his subjects. Even if Hales was at fault in not complying with the Act, the King ought not for that to lose his services if he needs them.

This dispensation does not infringe the rule laid down by Vaughan C.J. in *Thomas v. Sorrell* (1674).

'Where the suit is only the Kings for breach of a law, which is not to the particular damage of any third person, the King may dispense; but

where the suit is only the Kings, but for the benefit and safety of a third person, and the King is intitled to the suit by the prosecution and complaint of such third person, the King cannot release, discharge, or dispense with the suit, but by consent and agreement of the party concerned. . . .

'As the laws of nuisances are pro bono publico, so are all general penal laws; and if a nuisance cannot be dispens'd with for that reason, it follows, no penal law, for the same reason, can be dispens'd with.

'Therefore the reason is, because the parties particularly damaged by a nuisance, have their actions on the case for their damage, whereof the King cannot deprive them by his dispensation: and by the same reason, other penal laws, the breach of which are to mens particular damage, cannot be dispens'd with.' (Vaugh. 334-5.)

No particular person can have any damage by Hales's failure to take the test, and thus none can have any right of action against him. In such cases the King may dispense. If it be objected that the Act is a penal statute so necessary for the public welfare that it cannot be dispensed with, the answer is that all penal statutes are equally necessary, and if the King may dispense with one he may dispense with any. It is true this power may be abused: but the presumption must be that the King will not abuse it.

The dangerously wide character of the dispensing power was shown by the application of the principle underlying it to justify a prerogative to suspend the operation of statutes altogether. An exercise of the suspending power was the occasion for the *Trial of the Seven Bishops*, (1688) 12 St. Tr. 183. The case is of no interest to the constitutional lawyer, except to show that lawyers of the time saw what was involved in the royal claims. Powell J. said (at p. 427):

'This is a dispensation with a witness; it amounts to an abrogation and utter repeal of all the laws; for I can see no difference, nor know of none in law, between the king's power to dispense with laws ecclesiastical, and his power to dispense with any other laws whatsoever. If this be once allowed of, there will need no parliament; all the legislature will be in the king, which is a thing worth considering, and I leave the issue to God and your consciences.'

E.

How much remains to-day of the theory of Prerogative enunciated in these four cases? Have all the Tudor and Stuart innovations been swept away, and has the pure medieval doctrine been

restored? No doubt the parliamentary lawyers would have been pleased that it should be so; in fact the result is not so easy to state.

(1) The attributes of perpetuity and perfection still attach to the Crown. The attempt to make the King the State failed, but the King is still for juristic purposes the personification of the State, and is presumed to possess those qualities which are essential to the State. But this is pure theory, and little practical result flows from it. For example, the demise of the Crown long continued to be attended by grave practical inconveniences which could only be removed by Act of Parliament. (Maitland, *Collected Papers*, iii. 252-3; see also *Viscount Canterbury v. A.-G.*, p. 244 below.)

(2) The distinction between the natural and politic capacities of the King is obsolete. But we have no objection to considering the King for some purposes as a private individual, who can own property and do with it as he likes. And, though he cannot even in his private capacity be made the defendant in an action, yet, if judgment is given against him in a petition of right, the method of satisfying judgment will vary according to the public or private nature of the case. (Petitions of Right Act, s. 14, see p. 229 below.)

(3) We no longer speak of ordinary or absolute power, but we have the distinction none the less. There is no more identity than there was at the time of *Bates's Case* between the prerogatives in government, such as the right of directing foreign policy or the power to pardon criminals, and the power of the King to do justice in matters of property through his judges. The ordinary power of the King is not looked upon as Prerogative at all. The prerogatives in government, i.e. those which are not mere fiscal immunities, are still 'absolute'; there is no means of making the King or his ministers accountable at law for their exercise. It is precisely this want which has made necessary the development of the Cabinet system; thus the Attorney-General cannot be controlled by the Courts in the exercise of his quasi-judicial powers (see *Reg. v. Allen*, p. 274 below), but if he acts injudiciously may lay himself open to a vote of censure by the House of Commons, and possibly bring the Government down with him, as indeed happened when Mr. Ramsay MacDonald's Government fell in 1924.

(4) On the other hand, the distinction expressed in *Bates's Case* between private and public law has disappeared not only in name but also in substance. In the first half of the seventeenth century

there was no ambiguity in the terms 'public law', 'matters of state and government', 'absolute prerogative'. They were interchangeable, and meant that portion of public business which was usually transacted in the Privy Council or Star Chamber. When matters of this kind came before the ordinary courts, it was understood that the King must be informed and proceedings held up until he gave his approval. If by any chance the case was continued without his consent, he could issue the writ *de non procedendo rege inconsulto*, which was a complete bar to further proceedings.

But this writ and the Star Chamber both disappeared in the time of the Long Parliament. Hence that portion of the Prerogative which could be exercised only through the intervention of a court disappeared for good in 1641. The rest might survive, but subject only to the approval of the ordinary courts. In every case the King must make good at Common Law his claim to the prerogative; the mere plea of prerogative no longer ousts the jurisdiction of the Court. The plea of matter of State has no more force than the plea of prerogative; further, inasmuch as the Common Law knows no matter of State except such as is comprised in the more convenient and technical term Prerogative, there was no point in keeping two phrases where one would do. The term act of State in modern law is reserved to describe an act done by authority of the Crown to a foreign state or a foreigner outside the allegiance, and as this, though almost certainly done by virtue of the Prerogative, is not generally known by that name (see p. 295 below), the two terms seem now to be mutually exclusive. Similarly, with the suppression of Star Chamber vanished the distinction between public and private law. We speak still of public law, but only for purposes of classification. Constitutional law and local government law are based on exactly the same principles and afford cases for the decision of the same courts as, for instance, contracts, torts, and trusts: the character of an act is not essentially changed because it is done by government.

But the idea that the Government is, apart from Prerogative, entitled to special treatment died very hard. In *Carr's case*, (1680) 7 St. Tr. 929, Scroggs C.J. went so far as to say, 'If you write on the subject of government, whether in terms of praise or censure, it is not material; for no man has a right to say *anything* of government'. The modern view was first clearly stated by Lord Camden in his famous judgment in *Entick v. Carrington*.

✓ 'With respect to the argument of State necessity, or a distinction that has been aimed at between State offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions.' (See p. 153 below.)

Traces of the older doctrine are to be found in even later times. The line of cases which decide that servants of the Crown are not liable to be sued on contracts made by them as agents for the Crown, (*Macbeath v. Haldimand*, *Gidley v. Lord Palmerston* and *Dunn v. Macdonald*) all have in addition to the true *ratio decidendi*, which proceeds on grounds of private law, an alternative line of reasoning based on the peculiar character of service under government. There the doctrine has done little harm, except, perhaps, to render servants of the Crown immune from actions for breach of warranty of authority. (See p. 224 below.) An attempt was made in *Mersey Docks Trustees v. Gibbs* (see pp. 126, 156 below) to secure the immunity of local and central government authorities from liability for torts committed by their servants, and it is clear from Lord Wensleydale's judgment in the House of Lords that the doctrine of special treatment for government was not dead. Luckily that case gave it its death-blow. It is now evident that heads of government departments who are employed by the Crown owe their immunity from liability for the acts of their subordinates to the familiar principle of private law that one fellow-servant is not responsible for the tort of another unless the relation of principal and agent exists between them. (*Raleigh v. Goschen*, *Bainbridge v. P. M. G.*, pp. 250, 252 below.)

(5) We still hold by the maxim 'The King can do no wrong'. The prerogative and parliamentary lawyers, as we have seen above, had differed irreconcilably in the application of this rule. The former had attempted to use it to prove that the Prerogative was unlimited; the King can do no wrong, they said, therefore whatever he does and whatever his servants do by his authorization is right. On this point they were decisively worsted.¹ The modern doctrine is that of their opponents: once it is proved that wrong has been done, it is conclusively presumed that the King cannot have done it. But care must be taken not to press this doctrine too far. An act may be wrong in a subject if done without authorization from the King, and yet within the power of the King by right of

¹ The abolition of the dispensing and suspending powers in the Bill of Rights removed the last obstacle to the full operation of ministerial responsibility.

his Prerogative, and in that case the subject who obeys the royal commands may plead them in justification and there can be no occasion to apply the maxim that the King can do no wrong.

(6) No one would venture to argue nowadays that the King possesses inseparable prerogatives, but it was contended by the Attorney-General in *A.G. v. De Keyser's Royal Hotel* (p. 825 below), that where the Crown has a prerogative to do a certain act, and has also a statutory power to do it, it may exercise either the statutory power or the prerogative at its option. Thus, if the statute imposes conditions and the prerogative is absolute, the Crown may prefer to act by its prerogative, but if the statutory power is wider than the prerogative, it may under certain circumstances be advantageous to act under the statute.

It can hardly be said that there was before 1920 any definite pronouncement on the subject, nor do the different judgments in the *De Keyser Case* give a very clear answer to the question, what happens where statutory power and prerogative co-exist. Lord Atkinson quotes with approval (at p. 538) the words of Swinfen Eady M.R. in the Court of Appeal:

'Those powers which the executive exercises without Parliamentary authority are comprised under the comprehensive term of the prerogative. 'Where, however, Parliament has intervened and has provided by statute for powers, previously within the prerogative, being exercised in a particular manner and subject to the limitations and provisions contained in the statute, they can only be so exercised. Otherwise, what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative?'

All the judgments agree in substance with this view, but there is some divergence of opinion as to what happens to the Prerogative while the statutory power is in existence. For instance, Lord Atkinson said (at p. 589),

'It was suggested that when a statute is passed empowering the Crown to do a certain thing which it might theretofore have done by virtue of its prerogative, the prerogative is merged in the statute. I confess I do not think the word "merged" is happily chosen. I should prefer to say that when such a statute, expressing the will and intention of the King and of the three estates of the realm, is passed, it abridges the Royal Prerogative while it is in force to this extent: that the Crown can only do the particular thing under and in accordance with the statutory provisions, and that its prerogative power to do that thing is in abeyance.'

Lord Dunedin said (at p. 526),

'Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed.'

Lord Sumner held that the Executive did not act under the Prerogative, 'for the Defence Acts had superseded it' (at p. 562).

Lord Moulton said, that he did not think that the Prerogative had been abrogated in any way, but he agreed with Lord Sumner that the Defence Acts had 'given to the Crown statutory powers which render the exercise of that prerogative unnecessary, because the statutory powers that have been conferred upon it are wider and more comprehensive than those of the prerogative itself' (at p. 554).

Lord Parmoor was content to say (at pp. 575-6),

'The constitutional principle is that when the power of the Executive to interfere with the property or liberty of subjects has been placed under Parliamentary control, and directly regulated by statute, the Executive no longer derives its authority from the Royal Prerogative of the Crown but from Parliament, and that in exercising such authority the Executive is bound to observe the restrictions which Parliament has imposed in favour of the subject. . . . I am further of opinion that where a matter has been directly regulated by statute there is a necessary implication that the statutory regulation must be obeyed, and that as far as such regulation is inconsistent with the claim of a Royal Prerogative right, such right can no longer be enforced.'

(7) Since the *Case of Proclamations* (p. 68 below) it has been clear law that the Crown could not create a new offence except by Act of Parliament, and it had always been understood that unparliamentary legislation of every kind was against the law. In the case of *The Zamora* the question was raised whether the Crown could legislate by Order in Council, without the assent of parliament, so as to alter the rules of international law to be enforced in the Prize Court. The Privy Council decided that it could not. Most of the judgment is concerned with international law; those portions which are relevant to the present discussion will be found on p. 66 below.

CASES

THE CASE OF PROCLAMATIONS, (1611) 12 Co. Rep. 74

Memorandum, that upon Thursday, 20 Sept. 8 Regis Jacobi, I was sent for to attend the Lord Chancellor, Lord Treasurer, Lord Privy Seal, and the Chancellor of the Duchy; there being present the attorney, the solicitor, and recorder: and two questions were moved to me by the Lord Treasurer; the one if the King by his proclamation may prohibit new buildings in and about London, &c.; the other, if the King may prohibit the making of starch of wheat; and the Lord Treasurer said, that these were preferred to the King as grievances, and against the law and justice: and the King hath answered, that he will confer with his Privy Council, and his Judges, and then he will do right to them. To which I answered, that these questions were of great importance. 2. That they concerned the answer of the King to the body, viz. to the Commons of the House of Parliament. 3. That I did not hear of these questions until this morning at nine of the clock: for the grievances were preferred, and the answer made when I was in my circuit. And lastly, both the proclamations, which now were shewed, were promulgated, anno 5 Jac. after my time of attorneyship: and for these reasons I did humbly desire them that I might have conference with my brethren the Judges about the answer of the King, and then to make an advised answer according to law and reason. To which the Lord Chancellor said, that every precedent had first a commencement, and that he would advise the Judges to maintain the power and prerogative of the King; and in cases in which there is no authority and precedent, to leave it to the King to order in it, according to his wisdom, and for the good of his subjects, or otherwise the King would be no more than the Duke of Venice: and that the King was so much restrained in his prerogative, that it was to be feared the bonds would be broken: and the Lord Privy Seal said, that the physician was not always bound to a precedent, but to apply his medicine according to the quality of the disease: and all concluded that it should be necessary at that time to confirm the King's prerogative with our opinions, although that there were not any former precedent or

authority in law: for every precedent ought to have a commencement.

To which I answered, that true it is that every precedent hath a commencement; but when authority and precedent is wanting, there is need of great consideration, before that any thing of novelty shall be established, and to provide that this be not against the law of the land: for I said, that the King cannot change any part of the common law, nor create any offence by his proclamation, which was not an offence before, without Parliament. But at this time I only desired to have a time of consideration and conference with my brothers, for *deliberandum est diu, quod statuendum est semel*; to which the solicitor said, that divers sentences were given in the Star-Chamber upon the proclamation against building; and that I myself had given sentence in divers cases for the said proclamation: to which I answered, that precedents were to be seen, and consideration to be had of this upon conference with my brethren, for that *melius est recurrere, quam male currere*; and that indictments conclude, *contra leges et statuta*; but I never heard an indictment to conclude, *contra regiam proclamationem*. At last my motion was allowed; and the Lords appointed the two Chief Justices, Chief Baron, and Baron Altham, to have consideration of it.

Note, the King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm, 11 Hen. 4. 37. Fortescue, De Laudibus Angliæ Legum, cap. 9. 18 Edw. 4. 35, 36, &c. 31 Hen. 8. cap. 8. *hic infra*: also the King cannot create any offence by his prohibition or proclamation, which was not an offence before, for that was to change the law; and to make an offence which was not; for *ubi non est lex, ibi non est transgressio*; ergo, that which cannot be punished without proclamation, cannot be punished with it. *Vide* le stat. 31 Hen. 8. cap. 8 [*Repealed by 1 E. 6. c. 12. § 5.*] which Act gives more power to the King than he had before, and yet there it is declared that proclamations shall not alter the law, statutes, or customs of the realm, or impeach any in his inheritance, goods, body, life, &c. But if a man shall be indicted for a contempt against a proclamation, he shall be fined and imprisoned, and so impeached in his body and goods. *Vide* Fortescue, cap. 9, 18, 34, 36, 37, &c.

But a thing which is punishable by the law, by fine, and imprisonment, if the King prohibit it by his proclamation, before

that he will punish it, and so warn his subjects of the peril of it, there if he permit it after, this as a circumstance aggravates the offence; but he by proclamation cannot make a thing unlawful, which was permitted by the law before: and this was well proved by the ancient and continual forms of indictments; for all indictments conclude *contra legem et consuetudinem Angliæ*, or *contra leges et statuta, &c.* But never was seen any indictment to conclude *contra regiam proclamationem*.

So in all cases the King out of his providence, and to prevent dangers, which it will be too late to prevent afterwards, he may prohibit them before, which will aggravate the offence if it be afterwards committed: and as it is a grand prerogative of the King to make proclamation, (for no subject can make it without authority from the King, or lawful custom,) upon pain of fine and imprisonment, as it is held in the 22 Hen. 8. Proclamation B. But we do find divers precedents of proclamations which are utterly against law and reason, and for that void; for *quæ contra rationem juris introducta sunt non debent trahi in consequentiam*.

An Act was made, by which foreigners were licensed to merchandize within London; Hen. 4 by proclamation prohibited the execution of it; and that it should be in suspense *usque ad proximum Parliament*, which was against law. *Vide dors. claus. 8 Hen. 4.* Proclamation in London. But 9 Hen. 4 an Act of Parliament was made, that all the Irish people should depart the realm, and go into Ireland before the Feast of the Nativity of the Blessed Lady, upon pain of death, which was absolutely *in terrorem*, and was utterly against the law. . . .

In the same term it was resolved by the two Chief Justices, Chief Baron, and Baron Altham, upon conference betwixt the Lords of the Privy Council and them, that the King by his proclamation cannot create any offence which was not an offence before, for then he may alter the law of the land by his proclamation in a high point; for if he may create an offence where none is, upon that ensues fine and imprisonment: also the law of England is divided into three parts, common law, statute law, and custom; but the King's proclamation is none of them: also *malum aut est malum in se, aut prohibitum*, that which is against common law is *malum in se*, *malum prohibitum* is such an offence as is prohibited by Act of Parliament, and not by proclamation.

PREROGATIVE

Also it was resolved, that the King hath no prerogative, but that which the law of the land allows him.

But the King for prevention of offences may by proclamation admonish his subjects that they keep the laws, and do not offend them; upon punishment to be inflicted by the law, &c.

Lastly, if the offence be not punishable in the Star-Chamber, the prohibition of it by proclamation cannot make it punishable there: and after this resolution, no proclamation imposing fine and imprisonment was afterwards made, &c.

Extract from

THE ZAMORA, [1916] 2 A. C. 77

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

The decision of the Judicial Committee was delivered by

LORD PARKER OF WADDINGTON . . . The idea that the King in Council, or indeed any branch of the Executive, has power to prescribe or alter the law to be administered by Courts of law in this country is out of harmony with the principles of our Constitution. It is true that, under a number of modern statutes, various branches of the Executive have power to make rules having the force of statutes, but all such rules derive their validity from the statute which creates the power, and not from the executive body by which they are made. No one would contend that the prerogative involves any power to prescribe or alter the law administered in Courts of Common Law or Equity. It is, however, suggested that the manner in which Prize Courts in this country are appointed and the nature of their jurisdiction differentiate them in this respect from other Courts.

Prior to the Naval Prize Act, 1864, jurisdiction in matters of prize was exercised by the High Court of Admiralty, by virtue of a commission issued by the Crown under the Great Seal at the commencement of each war. The Commission no doubt owed its validity to the prerogative, but it cannot on that account be properly inferred that the prerogative extended to prescribing or altering the law to be administered from time to time under the

jurisdiction thereby conferred. The Courts of Common Law and Equity in like manner originated in an exercise of the prerogative. The form of commission conferring jurisdiction in prize on the Court of Admiralty was always substantially the same. Their Lordships will take that quoted by Lord Mansfield in *Lindo v. Rodney*, (1782) 2 Doug. 612, n., 614, n. as an example. It required and authorized the Court of Admiralty 'to proceed upon all and all manner of captures, seizures, prizes, and reprisals, of all ships and goods, that are, or shall be, taken; and to hear and determine, according to the course of the Admiralty, and the law of nations'. If these words be considered, there appear to be two points requiring notice, and each of them, so far from suggesting any reason why the prerogative should extend to prescribing or altering the law to be administered by a Court of Prize, suggests strong grounds why it should not.

In the first place, all those matters upon which the Court is authorized to proceed are, or arise out of, acts done by the sovereign power in right of war. It follows that the King must, directly or indirectly, be a party to all proceedings in a Court of Prize. In such a Court his position is in fact the same as in the ordinary Courts of the realm upon a petition of right which has been duly filed. Rights based on sovereignty are waived and the Crown for most purposes accepts the position of an ordinary litigant. A Prize Court must of course deal judicially with all questions which come before it for determination, and it would be impossible for it to act judicially if it were bound to take its orders from one of the parties to the proceedings.

In the second place, the law which the Prize Court is to administer is not the national or, as it is sometimes called, the municipal law, but the law of nations—in other words, international law. It is worth while dwelling for a moment on this distinction. Of course, the Prize Court is a municipal Court, and its decrees and orders owe their validity to municipal law. The law it enforces may therefore, in one sense, be considered a branch of municipal law. Nevertheless, the distinction between municipal and international law is well defined. A Court which administers municipal law is bound by and gives effect to the law as laid down by the sovereign State which calls it into being. It need inquire only what that law is, but a Court which administers international law must ascertain and give effect to a law which is not laid down by any

particular State, but originates in the practice and usage long observed by civilized nations in their relations towards each other or in express international agreement. It is obvious that, if and so far as a Court of Prize in this country is bound by and gives effect to Orders of the King in Council purporting to prescribe or alter the international law, it is administering not international but municipal law; for an exercise of the prerogative cannot impose legal obligation on any one outside the King's dominions who is not the King's subject. If an Order in Council were binding on the Prize Court, such Court might be compelled to act contrary to the express terms of the commission from which it derived its jurisdiction.

There is yet another consideration which points to the same conclusion. The acts of a belligerent Power in right of war are not justiciable in its own Courts unless such Power, as a matter of grace, submit to their jurisdiction. Still less are such acts justiciable in the Courts of any other Power. As is said by Story J. in the case of *The Invincible*, 2 Gall. 28, 44, 'the acts done under the authority of one Sovereign can never be subject to the revision of the tribunals of another Sovereign; and the parties to such acts are not responsible therefor in their private capacities'. It follows that but for the existence of Courts of Prize no one aggrieved by the acts of a belligerent Power in times of war could obtain redress otherwise than through diplomatic channels and at the risk of disturbing international amity. An appropriate remedy is, however, provided by the fact that, according to international law, every belligerent Power must appoint and submit to the jurisdiction of a Prize Court to which any person aggrieved by its acts has access, and which administers international as opposed to municipal law—a law which is theoretically the same, whether the Court which administers it is constituted under the municipal law of the belligerent Power or of the Sovereign of the person aggrieved, and is equally binding on both parties to the litigation. It has long been well settled by diplomatic usage that, in view of the remedy thus afforded, a neutral aggrieved by any act of a belligerent Power cognizable in a Court of Prize ought, before resorting to diplomatic intervention, to exhaust his remedies in the Prize Courts of the belligerent Power. A case for such intervention arises only if the decisions of those Courts are such as to amount to a gross miscarriage of justice. It is obvious, however,

that the reason for this rule of diplomacy would entirely vanish if a Court of Prize, while nominally administering a law of international obligation, were in reality acting under the direction of the Executive of the belligerent Power.

It cannot, of course, be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by Acts of the Imperial Legislature. But it is none the less true that if the Imperial Legislature passed an Act the provisions of which were inconsistent with the law of nations, the Prize Court in giving effect to such provisions would no longer be administering international law. It would in the field covered by such provisions be deprived of its proper function as a Prize Court. Even if the provisions of the Act were merely declaratory of the international law, the authority of the Court as an interpreter of the law of nations would be thereby materially weakened, for no one could say whether its decisions were based on a due consideration of international obligations, or on the binding nature of the Act itself. The fact, however, that the Prize Courts in this country would be bound by Acts of the Imperial Legislature affords no ground for arguing that they are bound by the executive orders of the King in Council. . . .

There are two further points requiring notice in this part of the case. The first arises on the argument addressed to the Board by the Solicitor-General. It may be, he said, that the Court would not be bound by an Order in Council which is manifestly contrary to the established rules of international law, but there are regions in which such law is imperfectly ascertained and defined; and, when this is so, it would not be unreasonable to hold that the Court should subordinate its own opinion to the directions of the Executive. This argument is open to the same objection as the argument of the Attorney-General. If the Court is to decide judicially in accordance with what it conceives to be the law of nations, it cannot, even in doubtful cases, take its directions from the Crown, which is a party to the proceedings. It must itself determine what the law is according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfil its function as a Prize Court and justify the confidence which other nations have hitherto placed in its decisions. . . .

The second point requiring notice is this. It does not follow that, because Orders in Council cannot prescribe or alter the law to be administered by the Prize Court, such Court will ignore them entirely. On the contrary, it will act on them in every case in which they amount to a mitigation of the Crown rights in favour of the enemy or neutral, as the case may be.

III

PARLIAMENTARY PRIVILEGE

THE history of Parliamentary Privilege recalls at many points that of the Prerogative; each indeed helps to the understanding of the other. Just as matters of state were decided in a special court, the Star Chamber or the Privy Council, so everything connected with Parliamentary Privilege is properly a matter for that one of the Houses of Parliament from which it takes its rise. The House of Commons claimed and was acknowledged to be a Court, for, as Coke says (1 Inst. 15), 'Every court of justice hath rules and customs for its direction . . . so the high court of parliament *suis propriis legibus et consuetudinibus subsistit*. It is *lex et consuetudo parliamenti* that all weighty matters in any parliament moved concerning the peers of the realm, or commons in parliament assembled, ought to be determined, adjudged, and discussed by the course of the parliament, not by the civill law, nor yet by the common laws of this realm used in more inferiour courts.' Not only, therefore, had each House extensive privileges, the relation of which to Common Law was undefined, but it acted as a tribunal for their interpretation and enforcement.

It is for these reasons that difficulties have arisen,¹ just as the conception of the king as a judge and the existence of the Star Chamber had caused difficulties in the first half of the seventeenth century. The Courts of Common Law recognized, as they were bound to do, the existence of rival Courts, exercising an uncon-

¹ Thus, in the case of colonial legislatures, which are not Courts, and to which only such powers are granted as 'are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute', these difficulties can no longer arise. The position is clearly stated by Parke B. in the Privy Council case of *Kielley v. Carson*, (1841-2) 4 Moo. P. C. C. at p. 89: 'It is said, however, that this power belongs to the House of Commons in England; and this, it is contended, affords an authority for holding it belongs as a legal incident, by the Common Law, to an Assembly with analogous functions. But the reason why the House of Commons has this power, is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo Parliamenti*, which forms a part of the Common Law of the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges.'

trolled jurisdiction, within limits which were but imperfectly defined, and able, like themselves, to enforce respect for their authority by commitments for contempt, into the exact ground of which it might be impossible for any other Court to inquire. Thus there grew up a body of parliamentary law as administered in the House of Commons. But whereas Charles I had been able to pack the Courts and so ensure decisions in his favour in matters of Prerogative, each House by itself had no power of interfering with the judges; and whereas he had been able to withdraw questions of Prerogative at will from the cognizance of the ordinary Courts by the writ *rege inconsulto*, the Courts have refused to decline jurisdiction at the mere mention of the *lex et consuetudo parliamenti*, and so a second body of parliamentary law has grown up as administered in the ordinary Courts. Decisions of the Houses on matters of Privilege have been reviewed by the Courts. There is no means of harmonizing these two systems of jurisprudence; in the nature of things conflicts must occur.

It is common ground that each House is the sole judge of its own privileges. But in the explanation of that highly equivocal statement conflicts have occurred between the Houses and the Courts. Is each House, merely within the limits of its privilege as defined by the Courts of common law, the judge of breaches of that privilege? Or is each House the judge of the limits of its own privilege, so that it may say not only that there has been a breach, but also that there was a privilege to break? Exactly the same kind of question had been raised with regard to Prerogative.

All things considered, it is not surprising that the first serious conflict between the House of Commons and the Law Courts should have turned, like the cases of *Bates* and *Hampden*, on a question of property. In *Ashby v. White*, (1703) 2 Ld. Raym. 938, the material issue, as stated by Holt C.J. was, 'Whether, if a free burgess of a corporation, who has an undoubted right to give his vote in the election of a burgess to serve in parliament, be refused and hindered to give it by the officer [i.e. the Mayor of Aylesbury], an action on the case will lie against such officer?' The House of Commons had at that time an acknowledged right of determining disputed elections, and, to that extent, of judging the value of each vote cast. Here, however, there was no dispute as to the result of the election, and therefore no occasion for exercising the jurisdiction

of the House. Yet three of the judges of the Queen's Bench, deciding on different grounds against the plaintiff, concurred in holding that the question was one of parliamentary privilege and not within their competence to determine. From this view Holt strongly dissented in the Queen's Bench, and his judgment was upheld, and that of his colleagues reversed, by the House of Lords, the Commons subsequently protesting strongly but without avail that the matter was one within their exclusive jurisdiction. Holt decided that the plaintiff had a property in his right to vote, that to deprive him of it was a great injury, and that he had in that case an action to enforce his right.

'But in the principal case,' he continued (at p. 956), 'my brothers say we cannot judge of this matter, because it is a parliamentary thing. O! by all means be very tender of that. Besides it is intricate, and there may be contrariety of opinions. But this matter can never come in question in parliament; for it is agreed that the persons for whom the plaintiff voted were elected; so that the action is brought for being deprived of his vote: and if it were carried for the other candidates against whom he voted, his damage would be less. To allow this action will make publick officers more careful to observe the constitution of cities and boroughs, and not to be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation. But they say, that this is a matter out of our jurisdiction, and we ought not to enlarge it. I agree we ought not to incroach or enlarge our jurisdiction; by so doing we usurp both on the right of the Queen and the people: but sure we may determine on a charter granted by the King, or on a matter of custom or prescription, when it comes before us, without incroaching on the parliament. And if it be a matter within our jurisdiction, we are bound by our oaths to judge of it. This is a matter of property determinable before us. Was ever such a petition heard of in parliament, as that a man was hindered of giving his vote, and praying them to give him remedy? The parliament undoubtedly would say, take your remedy at law. It is not like the case of determining the right of election between the candidates.

'My brother Powell says, that the plaintiff's right of voting ought first to have been determined in parliament. . . . Let us consider wherein the law consists, and we shall find it to be, not in particular instances and precedents, but in the reason of the law, and *ubi eadem ratio, ibi idem jus*. This privilege of voting does not differ from any other franchise whatsoever. If the house of commons do determine

this matter, it is not that they have an original right, but as incident to elections. But we do not deny them their right of examining elections, but we must not be frightened when a matter of property comes before us, by saying, it belongs to the parliament; we must exert the Queen's jurisdiction. My opinion is founded on the law of England. . . . Therefore my opinion is, that the plaintiff ought to have judgment.'

It was fortunate that so independent a judge as Holt was on the Bench. He saw clearly that the limits of Privilege were just as much a matter of common law as the limits of Prerogative, and that lack of power to control the House's jurisdiction by means of the prerogative writs had nothing to do with its legality. Indeed, in *Paty's Case*, (1704) 2 Ld. Raym. 1105, where the House of Commons attempted to stop actions similar to Ashby's brought by other burgesses of Aylesbury, by committing the plaintiffs to prison for contempt of the House, Holt held that a writ of habeas corpus would go to release any one committed for contempt by the House of Commons, where the cause stated in the return was insufficient in law. Here again he failed to convince his brother judges, but he has convinced posterity. Lord Ellenborough in *Burdett v. Abbot*, (1811) 14 East at p. 145, and Lord Denman in *The Sheriff of Middlesex's Case* (p. 92 below) expressly adopted his view of the law, and though Lord Ellenborough's approval was but dictum, the Attorney-General advised the House of Commons in *The Sheriff of Middlesex's Case* to disclose in the return no cause of commitment other than contempt of the House. Even Holt would have been compelled on that return to concur with the Court of King's Bench in remanding the prisoner. The decision shows how unfair it is to accuse the judges in *Darnel's Case* of servility. What the House of Commons had by the Petition of Right denied to the King in Council, they themselves claimed and established in 1840.

Holt's decision in *Paty's Case* is of first-rate importance. The controversy which came to a head in *Stockdale v. Hansard* and the *Case of the Sheriff of Middlesex* presented few points of difference from those in which Holt had taken part over a century before, and there is no better description of the points at issue than the following extract from his judgment in *Paty's Case*:

'I will suppose, that the bringing such actions was declared by the house of Commons to be a breach of their privilege; but that declara-

tion will not make that a breach of privilege that was not so before. But if they have any such privilege, they ought to shew precedents of it. The privileges of the house of Commons are well known, and are founded upon the law of the land, and are nothing but the law. As we all know they have no privileges in cases of breaches of the peace. And if they declare themselves to have privileges, which they have no legal claim to, the people of England will not be estopped by that declaration. This privilege of theirs concerns the liberty of the people in a high degree, by subjecting them to imprisonment for the infringement of them, which is what the people cannot be subjected to without an act of parliament. As to what was said, that the house of Commons are judges of their own privileges, he said, they were so, when it comes before them. And as to the instances cited, where the judges have been cautious in giving any answer in parliament in matters of privilege of parliament; he said, the reason of that was, because the members know probably their own privileges better than the judges. But when a matter of privilege comes in question in *Westminster hall*, the judges must determine it, as they did in *Binyon's case*. Suppose these actions against the constables of *Aylesbury* had gone on, and the defendants had pleaded this privilege; we must have determined, whether there were any such privilege or no. And we may as well determine it upon the return of this habeas corpus, for the defendants are here in a proper course of law, and the matter appears to us upon record as well this way, as if it were pleaded to an action. We must take notice of the *lex parliamenti*: my Lord Coke, in his 1 *Inst.* 11 b. enumerates the several laws that are within this realm, and the *lex parliamenti* is one of them, and the *lex parliamenti* is the law of the land. As to what my Lord Coke says in the same place, that the *lex parliamenti est a multis ignorata*, that is, because they will not apply themselves to understand it. He gave a great *encomium* of my Lord Clarendon, and cited a passage out of his history, relating to the same doctrine with this, that was then set up, that the house of Commons were the only judges of their own privileges, and therefore whatever they said was their privilege, was such: it is in his first part, fol. 310, &c. and is very applicable to the present case, but too long to be transcribed. He said, he would cite a greater author than he, King Charles the first, in his answer to the declaration and votes of the two Houses concerning *Hull*, *Clarendon*, 1 part, 400, and *Rushworth's Collections*, vol. 3, pp. 728, 730, 731, wherein, among other things he says, he very well knew the great and unlimited power of a parliament, but he knew as well, it was only in that sense, as he was a part of that parliament; without him and against his consent the votes of either or both houses together must not, could not, should not, (if he could help it, for his subjects' sake

as well as his own) forbid anything that was enjoined by the law, or enjoin any thing that was forbidden by the law. And the chief justice said, if the votes of both houses could not make a law, by parity of reason they could not declare law.' (*Reg. v. Paty*, (1704) 2 Ld. Raym. at p. 1113.)

The combined effect of the decisions in *Ashby v. White*, *Paty's Case*, *Stockdale v. Hansard*, and the *Case of the Sheriff of Middlesex* is this. The Courts deny to the Houses the right to determine the limits of their privileges, while allowing them within those limits exclusive jurisdiction. But the Houses have never expressly renounced the view that their claim to be judges of their own privileges is a claim to judge both of breaches of their undoubted privileges, and of the very existence and limits of those privileges themselves. Moreover, although the Courts do not and cannot recognize this claim directly, they are bound to give way whenever either of the Houses chooses to enforce it indirectly by committing the refractory litigant for contempt.

The cases of *Paty* and *The Sheriff of Middlesex* prove that the claim takes practical effect and is not merely *brutum fulmen*. And, by conceding to the Houses of Parliament in their capacity of superior courts the right of committing for contempt without cause shown, the Courts have really yielded the key of the fortress, by giving them the power of enforcing against the world at large their own views of the extent of their privileges.

Thus there may be at any given moment two doctrines of privilege, the one held by the Courts, the other by either House, the one to be found in the Law Reports, the other in Hansard; and there is no way of resolving the real point at issue should the conflict arise. But naturally such a conflict rarely arises. The Courts allow to the Houses almost complete and exclusive jurisdiction over everything which takes place within the walls of Parliament, and the Houses have long claimed little else; they have consented to the statutory limitation of many privileges—such as the freedom of members' servants from arrest—which were once undoubtedly theirs. And as for arbitrarily interfering with the jurisdiction of the Courts, legislation is now so easy, and the predominance of the House of Commons is now so secure, that there is no longer any need to take short cuts.

The undoubted privileges of the House of Commons are of three kinds. They include (i) exclusive jurisdiction over all questions

which arise within the walls of the House, except, perhaps, in case of felony. This kind of privilege is well illustrated in the case of *Bradlaugh v. Gossett* (p. 96 below). (ii) Certain personal privileges which attach to members of Parliament. The most important of these are freedom of debate, and immunity from civil arrest during the sitting of Parliament and for forty days before and after its assembling. Immunity from civil arrest is of very little importance since the abolition of imprisonment for debt (Debtors Act, 1869). Freedom of debate now rests upon an express provision in the Bill of Rights: 'That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament.' (iii) The power of executing decisions on matters of privilege by committing members of Parliament, or any other individuals, to imprisonment for contempt of the House. This is exemplified in the *Case of the Sheriff of Middlesex*.

It is convenient to deal in this place with the right which newspapers have to publish fair and accurate reports of parliamentary debates. This was established once and for all in the great case of *Wason v. Walter* (p. 105 below). The privilege here in question is the qualified privilege which is familiar as a defence to actions of defamation; it has nothing but its name in common with parliamentary privilege.

CASES

STOCKDALE v. HANSARD, (1839) 9 A. & E. 1

QUEEN'S BENCH

LORD DENMAN C.J.—This was an action for a publication defaming the plaintiff's character, by imputing that he had published an obscene libel.

The plea was, that the inspectors of prisons made a report to the Secretary of State, in which improper books were said to be permitted in the prison of Newgate; that the Court of Aldermen wrote an answer to that part of the report, and the inspectors replied repeating the statements, and adding that the improper books were published by the plaintiff. That all these documents were printed by and under orders from the House of Commons, who had come to a resolution to publish and sell all the papers they should print for the use of the members, and who also resolved, declared, and adjudged, that the power of publishing such of their reports, votes, and proceedings as they thought conducive to the public interest, is an essential incident to the due performance of the functions of Parliament, more especially, &c.

The plea, it is contended, establishes a good defence to the action on various grounds.

1. The grievance complained of appears to be an act done by order of the House of Commons, a Court superior to any Court of Law, and none of whose proceedings are to be questioned in any way.

This principle the learned counsel for the defendant repeatedly avowed in his long and laboured argument; but it does not appear to be put forward in its simple terms in the report that was published by a former House of Commons.

It is a claim for an arbitrary power to authorise the commission of any act whatever, on behalf of a body which in the same argument is admitted not to be the supreme power in the State.

The supremacy of Parliament, the foundation on which the claim is made to rest, appears to me completely to overturn it, because the House of Commons is not the Parliament, but only

a co-ordinate and component part of the Parliament. That sovereign power can make and unmake the laws; but the concurrence of the three legislative estates is necessary; the resolution of any one of them cannot alter the law, or place any one beyond its control. The proposition is therefore wholly untenable, and abhorrent to the first principles of the Constitution of England.

[His Lordship discussed exhaustively and dismissed the other grounds of defence, namely :

2. That the defendant committed the grievance by order of the House of Commons in a case of privilege, and that each House of Parliament is the sole judge of its own privileges ;

3. That a privilege of publication exists in the present case.

For the treatment of these two defences, the following extract from Patteson J.'s judgment has been preferred to that of the Lord Chief Justice.]

PATTESON J. *[after discussing the facts continued]*: Three questions appear to arise on this record.

First, whether an action at law will lie in any case for any act whatever admitted to have been done by the order and authority of the House of Commons.

Secondly, whether a resolution of the House of Commons, declaring that it had power to do the act complained of, precludes this Court from enquiring into the legality of that act.

Thirdly, if such resolution does not preclude this Court from enquiring, then whether the act complained of be legal or not. *[His Lordship dealt with the first question on the same lines as the Lord Chief Justice, and continued:]*

The second question is, as I conceive, raised upon this record, by the declaratory resolution of the 31st of May 1837, set out at the conclusion of the plea. The other resolutions and orders set out in the plea are not declaratory of the power or privilege of the House, but directory only: and, as it has been shewn that it is possible that the House, however unintentionally, may make illegal orders, and that, if it should do so, those who carry them into effect may be proceeded against by action at law, it follows that the Court in which such action is brought must, upon demurrer, enquire into the legality of those directory orders, and cannot be precluded from doing so by the mere fact of those orders having been made.

If this Court, then, be not precluded from entertaining the

question as to the legality of the directory orders by the orders themselves, it is precluded, if at all, by the resolution of the 31st of May 1887, and by nothing else. No other resolution of the House of Commons to a similar effect is set out in the plea, and we cannot look out of the record. It is certainly somewhat strange to urge that this Court, in which the present action was already pending, and which had already on its proceeding the declaration of the plaintiff, should be precluded from entering into the question by a resolution of the House of Commons passed between the declaration and the plea; but I pass on to consider the effect of the resolution as if it had been passed long before any action had been brought in which a question could arise as to the existence of the power to which it relates.

The proposition is certainly very startling, that any man, or body of men, however exalted, except the three branches of the Legislature concurring, should, by passing a resolution that they have the power to do an act illegal in itself, be able to bind all persons whatsoever, and preclude them from enquiring into the existence of that power and the legality of that act. Yet this resolution goes to that extent; for, unless it is taken to mean that the House of Commons has power to order the publication of that which it knows to be defamatory of the character of an individual, and to protect those who carry that order into effect from all consequences, it will not avail the defendants in this action. I take the resolution, therefore, to have that meaning, though the language of it does not necessarily so import. And I take it also, in combination with the resolutions in 1835, to mean that the House of Commons deems it necessary or conducive to the public interests that all the Parliamentary papers which it orders to be printed should be sold, though the resolution of 1837 by itself would seem to imply directly the contrary, and that some discrimination as to publishing should be exercised on the subject. Now, if the House of Commons, by declaring that it has power to publish all the defamatory matter which it may have ordered to be printed in the course of its proceedings with impunity to its publisher, can prevent all enquiry into the existence of that power, I see not why it may not, by declaring itself to have any other power in any other matter, equally preclude all enquiry in Courts of Law or elsewhere, as to the existence of such power. And what is this but absolute arbitrary dominion over all persons, liable to

no question or control? It is useless to say that the House cannot by any declaratory resolution give itself new powers and privileges; it certainly can, if it can preclude all persons from enquiring whether the powers and privileges, which it declares it possesses, exist or not: for then how is it to be ascertained whether those powers and privileges be new or not? If the doctrine be true that the House, or rather the members constituting the House, are the sole judges of the existence and extent of their powers and privileges, I cannot see what check or impediment exists to their assuming any new powers and privileges which they may think fit to declare. I am far from supposing that they will knowingly do so; but I see nothing to prevent it. Some mode of ascertaining whether the powers and privileges so declared be new or not must surely be found; and, if it be conceded that the Courts of Law, when that question of necessity arises before them, may make the enquiry, then the doctrine that the resolution of the 31st of May 1837 precludes enquiry by this Court must fall to the ground. But it is argued that the point must be ascertained by reference to public opinion. I cannot find in the common law, or statute law, or in any books of authority whatever, any allusion to such reference: and indeed what tribunal can be conceived more uncertain, fluctuating, and unsatisfactory, than 'public opinion'? It is even difficult to define what is meant by the words 'public opinion'.

It is further argued that the Courts of Law are Inferior Courts to the Court of Parliament and to the Court of the House of Commons, and cannot form any judgment as to the Acts and resolutions of their superiors. I admit fully that the Court of Parliament is superior to the Courts of Law; and in that sense they are Inferior Courts: but the House of Commons by itself is not the Court of Parliament. Further, I admit that the House of Commons; being one branch of the Legislature, to which Legislature belongs the making of laws, is superior in dignity to the Courts of Law, to whom it belongs to carry those laws into effect, and, in so doing, of necessity, to interpret and ascertain the meaning of those laws. It is superior also in this, that it is the grand inquest of the nation, and may enquire into all alleged abuses and misconduct in any quarter, of course in the Courts of Law, or any of the members of them; but it cannot, by itself, correct or punish any such abuses or misconduct; it can but accuse or institute proceedings against

the supposed delinquents in some Court of Law, or conjointly with the other branches of the Legislature may remedy the mischief by a new law. With respect to the interpretation and declaration of what is the existing law, the House of Lords is doubtless a Superior Court to the Courts of Law. And those Courts are bound by a decision of the House of Lords expressed judicially upon a writ of error or appeal, in a regular action at law or suit in equity; but I deny that a mere resolution of the House of Lords, or even a decision of that House in a suit originally brought there (if any such thing should occur, which it never will, though formerly attempted), would be binding upon the Courts of Law, even if it were accompanied by a resolution that they had power to entertain original suits: much less can a resolution of the House of Commons, which is not a Court of Judicature for the decision of any question either of law or fact between litigant parties, except in regard to the election of its members, be binding upon the Courts of Law. And it should be observed that, in making this resolution, the House of Commons was not acting as a Court either legislative, judicial, or inquisitorial, or of any other description. It seems to me, therefore, that the superiority of the House of Commons has really nothing to do with the question.

But it is further said that the Courts of Law have no knowledge or means of knowledge as to the *lex et consuetudo Parliamenti*, and cannot therefore determine any question respecting it. And yet, at the same time, it is said that the *lex et consuetudo Parliamenti* are part of the law of the land. And this Court is, in this very case, actually called upon by the defendants to pronounce judgment in their favour, upon the very ground that their act is justified by that very *lex et consuetudo Parliamenti*, of which the Court is said to be invincibly ignorant, and to be bound to take the law from a resolution of one branch of the Parliament alone. In other words, we are told that the judgment we are to pronounce is not to be the result of our own deliberate opinion on the matter before us, but that which is dictated to us by a resolution of the House of Commons, into the grounds and validity of which resolution we have no means of enquiring, and are indeed forbidden by Parliamentary law to enquire at all. I cannot agree to that position. If I am to pronounce a judgment at all, in this or in any other case, it must and shall be the judgment of my own mind, applying the law of the land as I understand it according to

the best of my abilities, and with regard to the oath which I have taken to administer justice truly and impartially.

But, after all, there is nothing so mysterious in the law and custom of Parliament, so far at least as the rest of the community not within its walls is concerned, that this Court may not acquire a knowledge of it in the same manner as of any other branch of the law. In the margin of the well-known passage in Lord Coke's Fourth Institute (4 Inst. 15, in marg. Also in Co. Litt. 11 b.), it is said to be *lex ab omnibus quærenda à multis ignorata, à paucis cognita*. The same might with the same truth be said of any other part of the law. Lord Coke says, in the same place, that the High Court of Parliament *suis propriis legibus et consuetudinibus subsistit*. This is perfectly correct also when applied to the internal regulations and proceedings of Parliament, or of either House; but it does not follow that it is so when applied to any power it may claim to exercise over the rest of the community.

It is, indeed, quite true that the members of each House of Parliament are the sole Judges whether their privileges have been violated, and whether thereby any person has been guilty of a contempt of their authority; and so they must necessarily adjudicate on the extent of their privileges. All the cases respecting commitments by the House, mostly raised upon writs of habeas corpus, and collected in the arguments and judgments in *Burdett v. Abbott*, (1811) 14 East, 1, establish, at the most, only these points, that the House of Commons has power to commit for contempt; and that, when it has so committed any person, the Court cannot question the propriety of such commitment, or inquire whether the person committed had been guilty of a contempt of the House; in the same manner as this Court cannot entertain any such questions, if the commitment be by any other Court having power to commit for contempt. In such instances, there is an adjudication of a Court of competent authority in the particular case; and the Court, which is desired to interfere, not being a Court of Error or of Appeal, cannot entertain the question whether the authority has been properly exercised. In order to make cases of commitment bear upon the present, some such case should be shewn in which the power of the House of Commons to commit for contempt under any circumstances was denied, and in which this Court had refused to enter into the question of the existence of that power. But no such case can be found, because

it has always been held that the House had such power, and the point attempted to be raised in the cases of commitment has been as to the due exercise of such power. The other cases which have been cited in argument relate generally to the privileges of individual members, not to the power of the House itself acting as a body; and hence, as I conceive, has arisen the distinction between a question of privilege coming directly or incidentally before a Court of Law. It may be difficult to apply the distinction. Yet it is obvious that, upon an application for a writ of habeas corpus by a person committed by the House, the question of the power of the House to commit, or of the due exercise of that power, is the original and primary matter propounded to the Court, and arises directly. Now, as soon as it appears that the House has committed the person for a cause within their jurisdiction, as for instance, for a contempt so adjudged to be by them, the matter has passed in *rem judicatam*, and the Court, before which the party is brought by writ of habeas corpus, must remand him. But if an action be brought in this Court for a matter over which the Court has general jurisdiction, as, for instance, for a libel, or for an assault and imprisonment, and the plea first declares that the authority of the House of Commons or its powers are in any way connected with the case, the question may be said to arise incidentally; the Court must give some judgment, must somehow dispose of the question. I do not, however, lay any great stress on this distinction. It seems to me that, if the question arises in the progress of a cause, the Court must of necessity adjudicate upon it, whether it can be said in strict propriety of language to arise directly or incidentally.

I do not purpose to go through all the authorities upon this part of the subject which have been already examined by my Lord, but to confine myself to a few of the leading cases; before, however, I do so, I would observe that privilege and power appear to me to be very different things, as I shall have occasion to observe hereafter, and that the present question appears to me to relate to the powers of the House of Commons and not to its privileges properly so called.

The principal case is *Thorp's Case*, (31 & 32 H. 6, 1 Hats. Pr. 28, from 5 Rot. Parl. 299. S. C. 18 Rep. 63).¹ I cannot pretend,

¹ 'The facts were, that the Lords, in Edward the Fourth's time, consulted the Judges respecting the privilege then claimed by a member of the Commons'

after all the observations which have been made upon that case by counsel and Judges, and by the report of the committee of the House of Commons on which the resolution of May 31st, 1837, was founded, and to which we have been referred by the Attorney-General, to throw any new light upon the real grounds of the answer there first delivered by the Judges. With all deference for ancient authority, it appears to me to have been an evasive answer, probably arising from the circumstances of the times: but if that be not so, the answer, being given in the House of Lords, has respect to the situation both of those who proposed the question and those who gave the answer, and amounts only to this, that they the Judges ought not to be called upon by the Lords in Parliament to inform them as to the privileges of Parliament, which they must themselves know; but it is nothing like a disclaimer of being able to decide any such question if it should arise in their own Courts. And, as to that part of their answer in which they speak of Parliament being able to make that law which was not law, it is plainly beside the question proposed; for it must relate to the power of the three branches of the Legislature concurring, and not to any resolutions of any one of them separately, or even of any two of them; added to which, they do actually give their opinion as to what they would hold in their own courts, and the Lords adopt and act upon it.

The passages in Lord Coke's Fourth Institute (4 Inst. 15. See also 4 Inst. 49, 50.) rest upon *Thorp's Case*, and if the foundation fails, the superstructure cannot stand, however celebrated the architect may be.

Expressions are certainly to be found in *Rex v. Wright*, (1799) 8 T. R. 293, which appear to withdraw from the Courts of Law all power of noticing the publication of Parliamentary papers; but the expressions used by Lord Kenyon appear to me, I say it with hesitation, and pace tanti viri, to be quite inconsistent;¹ and I am

House, and the Judges at first declined to answer. . . . The Judges did ultimately waive their objection to declaring an opinion on a question of privilege; they declared it in Parliament, and by Parliament it was adopted.' (Extract from Lord Denman's Judgment, at p. 117.)

¹ 'Mr. Horne Tooke had applied for a criminal information against a book-seller, for publishing a copy of the report made by a committee of the House of Commons, which was supposed to convey a charge of high treason against Mr. Tooke, after he had been tried for that crime and acquitted. . . . His Lordship says, "This is a proceeding by one branch of the Legislature, and, therefore, we cannot enquire into it." If this be true, one branch of the

at a loss to know on what ground he really proceeded: whilst Mr. Justice Lawrence appears to have considered that the matter was not libellous, let it be published by whom it would; and it is to be observed that it did not appear that it was published by order of the House of Commons. Again, the authority of that case is greatly shaken by *Rex v. Creevey*, (1818) 1 M. & S. 278; and, even if that was not so, it is to be recollected that the motion there was for a criminal information, which is a matter of discretion and not of right, and moreover that the doctrine as to the legality of publishing proceedings of Courts of Justice was then recently held without those qualifications and restrictions which, as I think, common sense, and the obvious good of the community at large, have compelled the Judges since that time to engraft upon it.

On the other hand, the cases of *Donne v. Walsh*, (1473) 1 Hats. Prec. 41, *Ryver v. Cosyn*, (1474) 1 Hats. Pr. 42, and *Benyon v. Evelyn*, O. Bridgman's Judgments, 324, shew that the Courts of Law have taken cognisance of such questions, and have decided contrary to the known claims of the House for its members: and whether it be true or not that Sir Orlando Bridgman made a gratuitous and unnecessary display in the latter case, this is certain, that his learned and laboured judgment must have excited, and did excite, great attention, and yet the decision was acquiesced in.¹ It is true that we have no evidence of the direct interference of the House in that case; neither could they constitutionally interfere as a body, inasmuch as no act of theirs, as a body, was brought into question; but no one doubts that the claim of the member was in reality the claim of the House. To that case may be added *Fitchharris's Case*, (1681) 8 How. St. Tr. 228, and that of

Legislature has power to overrule the law. Lord Kenyon felt this, and denied the existence of such a power, adding, "I do not say that cases may not be put, in which we would enquire whether or not the House of Commons were justified in any particular measure." We cannot fail to see that the one sentence is in direct contradiction to the other.' (Extract from Lord Denman's Judgment, at pp. 121-3.)

¹ 'Sir O. Bridgman, delivering the judgment of the Court in *Benyon v. Evelyn*, brings this result out of his examination of ancient authorities. "That resolutions or resolves of either House of Parliament, singly, in the absence of the parties concerned, are not so conclusive in Courts of Law, but that we may (with due respect nevertheless had to those resolves and resolutions), nay, we must give our judgment according as we, upon oath, conceive the law to be, though our opinions fall out to be contrary to those resolutions or votes of either House.'" (Extract from Lord Denman's Judgment, at pp. 132-3.)

The Duchess of Somerset v. The Earl of Manchester, Prynne's Reg. part 4, 1214, and the memorable cases of *Ashby v. White*, (1703) 2 Ld. Ray. 938, and *Regina v. Paty*, (1704) 2 Ld. Ray. 1105, and *Knollys's Case*, (1694) 12 How. St. Tr. 1167. I do not mention these last cases as showing that the jurisdiction of the Courts of Law, in matters said to concern the privileges of Parliament, has been conceded by the House of Commons, but as showing that it has not been decided that such jurisdiction in no case exists: and in *Ashby v. White* there was strong ground for maintaining that the House of Commons had exclusive jurisdiction over the subject as a Court of Judicature, though I think not sufficient ground; whereas, on the present question there is no possible ground for so saying. I agree that the case of *Rex. v. Williams*, (1684-1695) 13 How. St. Tr. 1369, is not to be relied on.¹ The political character of it, the violence of the times, and the just dread of arbitrary power in the Crown, which occasioned the allusion to it in the Bill of Rights, deprive it of authority as a solemn judgment of the

¹ 'Sir W. Williams was prosecuted (13 How. St. Tr. 1369. 2 Show. 417), by *ex officio* information for an order signed by him as Speaker, authorizing the publication and sale of Dangerfield's Narrative, being a slanderous libel on James, Duke of York. . . . His trial did not come on till the duke had ascended the throne; he pleaded to the jurisdiction of the Court, and that plea is admitted to have been properly overruled; he then pleaded as a justification the order of the House of Commons, and that plea was set aside without argument. He was fined 10,000*l.*, and afterwards the fine was reduced to 8,000*l.* He never questioned this sentence, nor has it been reversed by any Court or by Act of Parliament. . . . Now, though the Narrative was indeed the paper of a private individual, it was adopted by the House, who ordered its publication; the Speaker did not publish as an individual, nor under pretence of their sanction, but as Speaker, and by their direct command. It was, therefore, an Act done in Parliament. The proceeding was by consequence a breach of the fundamental privilege which exempts all that is there done from question. . . .

Even if this case were not bad law, it would be worthy of the severest censure. . . . But in what respect can it be said to bear the least analogy to the present case? The Speaker is not here sued: the sale of the present libel is not by the Speaker, nor took place within the walls of Parliament. . . . I find, in 3 Mod. 68, that Dangerfield himself had been convicted and punished for this same publication; and of that sentence I do not find that the legality any more than the justice has ever been challenged; yet it is plain that the Speaker's order under the authority of the House would have been as good a justification to him for publishing, as the resolution of the House can now be to the present defendant. These two cases afford the true distinction; *Rex v. Williams* was ill decided, because he was questioned for what he did by order of the House, within the walls of Parliament. *Rex v. Dangerfield* is undoubted law, because he sold and published, beyond the walls of Parliament, under an order to do what was unlawful.' (Extract from Lord Denman's Judgment, at pp. 124-6.)

Court. Yet it is plain that the Speaker of the House of Commons could not be justified, even under the law of privilege as declared by the resolution of the 31st of May 1837, in publishing Dangerfield's Narrative, which was no part of the proceedings of the House: and the bare authority of the House could alone be set up as his justification, which I have already shown to be insufficient for that purpose. Another ground may be taken to shew that *Rex v. Williams* was not a right decision, that the thing done by him, viz. the order to publish, may be said to have been done in the House, and so not to be cognizable by the Courts of Law. Yet the man himself, for whose benefit the publication took place, Dangerfield, was committed and punished for publishing the very same thing out of the House. That which was reprobated in *Williams's case* was the prosecution, by the officer of the Crown, of the Speaker of the House for an act done by him as such Speaker. The legality of such an act, as regarded private individuals, was in no way brought under review. And the Bill of Rights (Stat. 1 W. & M. sess. 2, c. 2, s. 1.) plainly points at prosecutions for proceedings in Parliament only.

I do not particularly advert to the other cases cited from Hatsell and other books; for they really do not appear to me to bear materially upon this part of the case, or indeed upon any of the questions raised upon this record. The supposed mischief of an appeal to the House of Lords cannot surely prevent this Court from adjudicating on the question. Indeed the Attorney-General asks us to pronounce judgment for the defendants, because the House of Commons have resolved that we are bound to do so: yet upon that judgment a writ of error will lie just as much as if we give judgment for the plaintiff. To avoid such inconvenience, if it be important to do so, some legal mode should have been found of making it unnecessary for us to give any judgment at all: but no such mode can be found. The analogy attempted to be established, upon the argument, from decisions of Courts of exclusive jurisdiction, appears to me not to hold good. The instances adduced are in respect of matters admitted to be within the exclusive jurisdiction of such Courts, whether ecclesiastical, or Courts of Admiralty, or foreign Courts, and in which they have in the particular case come to a decision, and so the matter has passed in *rem judicatam*; but none have been or can be cited where a decision of any of those Courts, that a particular matter

is within its exclusive jurisdiction, has been allowed to be binding upon other Courts as to that position, and to oust them of their right of jurisdiction: it may be that in some cases there is concurrent jurisdiction: and, as I have before observed, the resolution of May 1837 cannot be considered to have been passed by the House of Commons as a Court either legislative, judicial, or inquisitorial, or of any other description. Cases were cited by the Attorney-General, where the Court of Exchequer had taken from the other Courts of Law proceedings pending before them; but they were cases of revenue belonging by the King's prerogative peculiarly to that Court, and in which that Court had confessedly exclusive jurisdiction.

Some cases were also cited where the House of Lords had compelled parties to relinquish proceedings in the Courts of Law in respect of matters occurring in that House, as to which it is conceded that the Courts of Law cannot have cognizance.

It is further argued that, if this Court can entertain this question, so can the most Inferior Court of Record in the kingdom, where the matter arises within its jurisdiction. I admit it to be so; but I can see no reason why the mere resolution of the House should preclude an Inferior Court from the enquiry, any more than this Court: nor can I see anything derogatory to the dignity of the House in such inquiry.

Upon the whole the true doctrine appears to me to be this: that every Court in which an action is brought upon a subject-matter generally and *primâ facie* within its jurisdiction, and in which, by the course of the proceedings in that action, the powers and privileges and jurisdiction of another Court come into question, must of necessity determine as to the extent of those powers, privileges, and jurisdiction: that the decisions of that Court, whose powers, privileges, and jurisdiction are so brought into question, as to their extent, are authorities, and, if I may so say, evidences in law upon the subject, but not conclusive. In the present case, therefore, both upon principle and authority, I conceive that this Court is not precluded by the resolution of the House of Commons of May 1837 from inquiring into the legality of the act complained of, although we are bound to treat that resolution with all possible respect, and not by any means to come to a decision contrary to that resolution unless we find ourselves compelled to do so by the law of the land, gathered from the

principles of the common law, so far as they are applicable to the case, and from the authority of decided cases, and the judgments of our predecessors, if any be found which bear upon the question.

I come then to the third question: whether the act complained of be legal or not. I do not conceal from myself that, in considering this point, the resolution of the House of Commons of 31st May 1837 is directly called in question; but, for the reasons I have already given, I am of opinion that this Court is, not only competent, but bound, to consider the validity of that resolution, paying all possible respect, and giving all due weight, to the authority from which it emanates.

The privilege, or rather power (for that is the word used), which that resolution declares to be an essential incident to the constitutional functions of Parliament, is attempted to be supported, first, by shewing that it has been long exercised and acquiesced in; secondly, that it is absolutely necessary to the legislative and inquisitorial functions of the House.

First, as to exercise and acquiescence. I am far from saying that, in order to support any privilege or practice of Parliament, or of either House, it is necessary to shew that such privilege or practice has existed from time of legal memory. That point was disposed of by Lord Ellenborough, in the course of the argument in *Burdett v. Abbot*, (1811) 14 East, 1. See the judgment of Lord Ellenborough, p. 139. Long usage, commencing since the two Houses sat separately (if indeed they ever sat together, as to which I do not stop to inquire, nor when they separated, as being wholly immaterial to this question), may be abundantly sufficient to establish the legality of such privilege or practice. [*His Lordship discussed the historical evidence as to exercise and acquiescence, but found it inconclusive.*]

The power claimed is said to be necessary to the due performance both of the legislative and inquisitorial functions of the House. In all the cases and authorities, from the earliest times hitherto, the powers which have been claimed by the House of Commons for itself and its members, in relation to the rest of the community, have been either some privilege properly so called, i. e., an exemption from some duty, burden, attendance, or liability to which others are subject, or the power of sending for and examining all persons and things, and the punishing all contempts committed

against their authority. Both of these powers proceed on the same ground, viz. the necessity that the House of Commons and the members thereof should in no way be obstructed in the performance of their high and important duties, and that, if the House be so obstructed, either collectively, or in the persons of the individual members, the remedy should be in its own hands, and immediate, without the delay of resorting to the ordinary tribunals of the country. Hence liberty of speech within the walls of the House, freedom from arrest, and from some other restraints and duties during the sitting of Parliament, and for a reasonable time before and after its sitting (with the exception of treason, felony, and breach of the peace), which, although the privileges, properly so styled, of the individual members, are yet the privileges of the House. Hence the power of committing for contempt those who obstruct their proceedings, either directly, by attacks upon the body or any of its members, or indirectly, by vilifying or otherwise opposing its lawful authority. Cases have frequently arisen in which the extent and exercise of these privileges and powers have come in question: and I believe that all such cases will be found to range themselves under one of the two heads I have mentioned. [*But his Lordship was of opinion that the necessity for the privilege in question was not made out.*]

Privilege, that is, immunities and safeguards, are necessary for the protection of the House of Commons, in the exercise of its high functions. All the subjects of this realm have derived, are deriving, and I trust and believe will continue to derive, the greatest benefits from the exercise of those functions. All persons ought to be very tender in preserving to the House all privileges which may be necessary for their exercise, and to place the most implicit confidence in their representatives as to the due exercise of those privileges. But power, and especially the power of invading the rights of others, is a very different thing: it is to be regarded, not with tenderness, but with jealousy; and, unless the legality of it be most clearly established, those who act under it must be answerable for the consequences. The onus of shewing the existence and legality of the power now claimed lies upon the defendants: it appears to me, after a full and anxious consideration of the reasons and authorities adduced by the Attorney-General in his learned argument, and after much reflection upon the subject, that they have entirely failed to do so: and I am therefore of

opinion that the plaintiff is entitled to our judgment in his favour.¹

LITLEDALE and COLERIDGE JJ. delivered judgment to the same effect.

Judgment for the plaintiff.

THE CASE OF THE SHERIFF OF MIDDLESEX, (1840) 11 A. & E. 273

QUEEN'S BENCH

To a habeas corpus ad subjiciendum, &c. it was returned by the serjeant at arms of the House of Commons that he detained the prisoners on the following warrant, directed to him by the Speaker.—‘Martis 21^o die Januarii, 1840. Whereas the House of Commons have this day resolved that W. E. and J. W., Sheriff of Middlesex, having been guilty of a contempt and breach of the privileges of this House, be committed to the custody of the serjeant at arms attending this House, these are therefore to require you to take into your custody the bodies of the said W. E. and J. W. and them safely to keep during the pleasure of this House, for which this shall be your sufficient warrant. Given under my hand,’ &c.—‘C. S. Lefevre, Speaker.’

LORD DENMAN C.J.—I think it necessary to declare that the judgment delivered by this Court last Trinity term, in the case of *Stockdale v. Hansard*, appears to me in all respects correct. The Court decided there that there was no power in this country above being questioned by law. [*His Lordship justified the decision of the Court and reflected on the omission of the House of Commons to take the case on appeal before the Court of Exchequer Chamber*

¹ We have had the less compunction in abbreviating Patteson J.’s argument on the third line of defence because the law on this subject was almost immediately altered by the Parliamentary Papers Act 1840 (3 & 4 Vict. c. 9), which conferred absolute privilege on all reports, papers, votes, and proceedings published by order of either House of Parliament; but the discussion of the method employed to establish the existence of a privilege of Parliament is still of value.

Subsequently the plaintiff brought other similar actions against the defendant, who, by the orders of the House of Commons, allowed them to go by default. Upon the Sheriff of Middlesex attempting to execute judgment in one of these actions, he was committed by the House of Commons for contempt of the House. It was out of these proceedings that the next case arose.

and the House of Lords.] In deciding the former case, we looked to the law as our only safe guide, discarding all considerations of supposed expediency; and, under the same guidance, we examine the question now before us.

The only question upon the present return is, whether the commitment is sustained by a legal warrant. Three objections have been taken to the warrant, in point of form merely. [*His Lordship overruled these objections.*] The verbal criticisms, therefore, fall to the ground. The great objection remains behind, that the facts which constitute the alleged contempt are not shewn by the warrant.

It may be admitted that words containing this kind of statement have appeared in most of the former cases; indeed there are few in which they have not. In the proceedings upon the case of *Jay and Topham*, (1689) 12 How. St. Tr. 821, where Sir Francis Pemberton and Sir Thomas Jones were committed by the House of Commons for a judgment as just and reasonable as any ever pronounced, the resolution as to each was, that he, 'giving judgment to overrule the plea to the jurisdiction of the Court of King's Bench, in the case between Jay and Topham, had broken the privileges of the House.' I mention this case chiefly for the purpose of correcting a mistake of no small importance. It has been supposed that the resolution to which I have referred was passed by the Convention Parliament, and had the sanction of Sir J. Holt, as one of the members: but the resolution was passed in July 1689; and in April of that year Holt was made Chief Justice of the King's Bench. In *Brass Crosby's*, (1771) 2 W. Bl. 754, 3 Wils. 188, *Sir F. Burdett's*, (1811) 14 East, 1, and *Mr. Hobhouse's*, (1820) 2 Chitt. Rep. 207, cases, words were used shewing the nature of the contempt. In *The Earl of Shaftesbury's case*, (1677) 6 How. St. Tr. 1269. 1 Mod. 144, the form was general; and it was held unnecessary to set out the facts on which the contempt arose. That case is open to observation on other grounds; but I think it has not been questioned on this. In *Regina v. Paty*, (1704) 2 Ld. Ray. 1105, three of the Judges adopted the doctrine of that case to the extent of holding that the Court could not inquire into the ground of commitment, even when expressed in the warrant. Holt C.J. differed from them on that point; but he did not question that, where the warrant omitted to state facts, the case could not be inquired into. In *Murray's case*, (1751) 1 Wils. 299,

which has often been referred to, and recognised as an authority, the warrant was in a general form.

There is, perhaps, no case in the books entitled to so great weight as *Burdett v. Abbot*, (1811) 14 East, 1, from the learning of the counsel who argued and the Judges who decided it, the frequent discussions which the subject underwent, and the diligent endeavours made to obtain the fullest information upon it. The judgment of Lord Ellenborough there, as it bears on the point now before us, is remarkable. He says (at p. 150), 'If a commitment appeared to be for a contempt of the House of Commons generally, I would neither in the case of that Court, or of any other of the Superior Courts, inquire further: but if it did not profess to commit for a contempt, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the Court committing, but a ground of commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law, or natural justice; I say, that in the case of such a commitment, (if it ever should occur, but which I cannot possibly anticipate as ever likely to occur,) we must look at it and act upon it as justice may require from whatever Court it may profess to have proceeded.' Bayley J., as well as Lord Ellenborough, appears in that case to have been of opinion that, if particular facts are stated in the warrant, and do not bear out the commitment, the Court should act upon the principle recognised by Holt C.J. in *Regina v. Paty*; but that, if the warrant merely states a contempt in general terms, the Court is bound by it. That rule was adopted by this Court in *Rex v. Hobhouse*; and in the late case of *Stockdale v. Hansard*, there was not one of us who did not express himself conformably to it. In the passages which have been cited from my own judgment in that case, as shewing that, if a person were committed for a contempt in trespassing upon a member's property, this Court would notice the ground of committal, I always supposed that the insufficient ground should appear by the warrant. *The Earl of Shaftesbury's case* has been dwelt upon in the argument as governing the decisions of the Courts on all subsequent occasions; but I think not correctly.

There is something in the nature of the Houses themselves which carries with it the authority that has been claimed; though in discussing such questions, the last important decision is always

referred to. Instances have been pointed out in which the Crown has exerted its prerogative in a manner now considered illegal, and the Courts have acquiesced; but the cases are not analogous. The Crown has no rights which it can exercise otherwise than by process of law and through amenable officers: but representative bodies must necessarily vindicate their authority by means of their own; and those means lie in the process of committal for contempt. This applies not to the Houses of Parliament only, but (as was observed in *Burdett v. Abbot*, (1811) 14 East, 188) to the Courts of Justice, which, as well as the Houses, must be liable to continual obstruction and insult if they were not entrusted with such powers. It is unnecessary to discuss the question whether each House of Parliament be or be not a Court; it is clear that they cannot exercise their proper functions without the power of protecting themselves against interference. The test of the authority of the House of Commons in this respect, submitted by Lord Eldon to the Judges in *Burdett v. Abbot*, (1817) 5 Dow, 199, was, whether, if the Court of Common Pleas had adjudged an act to be a contempt of Court, and committed for it, stating the adjudication generally, the Court of King's Bench, on a habeas corpus setting forth the warrant, would discharge the prisoner because the facts and circumstances of the contempt were not stated. A negative answer being given, Lord Eldon, with the concurrence of Lord Erskine (who had before been adverse to the exercise of jurisdiction), and without a dissentient voice from the House, affirmed the judgment below. And we must presume that what any Court, much more what either House of Parliament, acting on great legal authority, takes upon it to pronounce a contempt, is so.

It was urged that, this not being a criminal matter, the Court was bound, by stat. 56, G. 3, c. 100, s. 8, to inquire into the case on affidavit; but I think the provision cited is not applicable. On the motion for a habeas corpus, there must be an affidavit from the party applying; but the return, if it discloses a sufficient answer, puts an end to the case: and I think the production of a good warrant is a sufficient answer. Seeing that, we cannot go into the question of contempt on affidavit, nor discuss the motives which may be alleged. Indeed (as the Courts have said in some of the cases) it would be unseemly to suspect that a body, acting under such sanctions as a House of Parliament, would, in making

its warrant, suppress facts which, if discussed, might entitle the person committed to his liberty. If they ever did so act, I am persuaded that, on further consideration, they would repudiate such a course of proceeding. What injustice might not have been committed by the ordinary Courts in past times, if such a course had been recognised! as, for instance, if the recorder of London, in *Bushell's case*, (1670) Vaugh. 135, had, in the warrant of commitment, suppressed the fact that the jurymen were imprisoned for returning a verdict of acquittal. I am certain that such will never become the practice of any body of men amenable to public opinion.

In the present case, I am obliged to say that I find no authority under which we are entitled to discharge these gentlemen from their imprisonment.

LITLEDALE, WILLIAMS, and COLERIDGE JJ. delivered concurring judgments.

Prisoners remanded.

✓ BRADLAUGH v. GOSSETT, (1884) 12 Q. B. D. 271

QUEEN'S BENCH DIVISION

STEPHEN J.—The demurrer admits for the purposes of our decision the truth of the matters stated in the statement of claim. In a few words they are as follows: The resolution of the House of Commons of the 9th of July, 1883, read with the correspondence between the Speaker and Mr. Bradlaugh shews that for reasons which are not before us the House of Commons resolved that Mr. Bradlaugh, who had been duly elected member for Northampton, should not be permitted to take the oath prescribed by law for members duly elected, and that he should be excluded, if necessary, by actual force from the House, unless he would engage not to do so. We are asked to declare this order void, and to restrain the Serjeant-at-arms from enforcing it.

I may observe, before considering this question, that but for the amendment made at the hearing I at least should have felt bound to decide the case on a much narrower ground than that on which I think we ought to deal with it. Taken by itself, the order of the 9th of July states nothing except that the House had by resolution excluded a member, who in the judgment of the

House had disturbed its proceedings, till he undertook not further to disturb it. It is obvious that we could not interfere with what might be a mere measure of internal discipline. The order as it stands is consistent with the supposition that Mr. Bradlaugh, on presenting himself to take the oath, had in some way misconducted himself, and that the House had ordered him to be excluded till he promised not to repeat his misconduct. With such a measure of internal discipline we obviously could not interfere. The correspondence with the Speaker certainly sets the matter in a different light. I cannot read the statement of claim as asserting less or interpret the demurrer as admitting less than what I have already stated; and this raises the question which the parties probably wished to have decided in a very broad way.

The legal question which this statement of the case appears to me to raise for our decision is this: Suppose that the House of Commons forbids one of its members to do that which an Act of Parliament requires him to do, and, in order to enforce its prohibition, directs its executive officer to exclude him from the House by force if necessary, is such an order one which we can declare to be void and restrain the executive officer of the House from carrying out? In my opinion, we have no such power. I think that the House of Commons is not subject to the control of Her Majesty's Courts in its administration of that part of the statute-law which has relation to its own internal proceedings, and that the use of such actual force as may be necessary to carry into effect such a resolution as the one before us is justifiable.

Many authorities might be cited for this principle; but I will quote two only. The number might be enlarged with ease by reference to several well-known cases. Blackstone says (1 Com. 163): 'The whole of the law and custom of Parliament has its original from this one maxim, "that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere"'. This principle is re-stated nearly in Blackstone's words by each of the judges in the case of *Stockdale v. Hansard*, (1839) 9 A. & E. 1. As the principal result of that case is to assert in the strongest way the right of the Court of Queen's Bench to ascertain in case of need the extent of the privileges of the House, and to deny emphatically that the Court is bound by a resolution of the House declaring any particular matter to fall within their

privilege, these declarations are of the highest authority. Lord Denman says (at p. 114): 'Whatever is done within the walls of either assembly must pass without question in any other place.' Littledale J. says (at p. 162): 'It is said the House of Commons is the sole judge of its own privileges; and so I admit as far as the proceedings in the House and some other things are concerned.' Patteson J. said (at p. 209): 'Beyond all dispute, it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled, that whatever is said or done in either House should not be liable to examination elsewhere.' And Coleridge J. said (at p. 238): 'That the House should have exclusive jurisdiction to regulate the course of its own proceedings, and animadvert upon any conduct there in violation of its rules or derogation from its dignity, stands upon the clearest grounds of necessity.'

Apply the principle thus stated to the present case. We are asked to declare an order of the House of Commons to be void, and to prevent its execution in the only way in which it can be executed, on the ground that it constitutes an infringement of the Parliamentary Oaths Act (29 Vict. c. 19). This Act requires the plaintiff to take a certain oath. The House of Commons have resolved that he shall not be permitted to take it. Grant, for the purposes of argument, that the resolution of the House and the Parliamentary Oaths Act contradict each other; how can we interfere without violating the principle just referred to? Surely the right of the plaintiff to take the oath in question is 'a matter arising concerning the House of Commons,' to use the words of Blackstone. The resolution to exclude him from the House is a thing 'done within the walls of the House,' to use Lord Denman's words. It is one of those 'proceedings in the House of which the House of Commons is the sole judge,' to use the words of Littledale J. It is a 'proceeding of the House of Commons in the House,' and must therefore, in the words of Patteson J., 'be entirely free and unshackled.' It is 'part of the course of its own proceedings,' to use the words of Coleridge J., and is therefore 'subject to its exclusive jurisdiction.' These authorities are so strong and simple that there may be some risk of weakening them in adding to them. Nevertheless, the importance of the case may excuse some further exposition of the principle on which it seems to me to depend.

The Parliamentary Oaths Act prescribes the course of proceeding to be followed on the occasion of the election of a member of

Parliament. In order to raise the question now before us, it is necessary to assume that the House of Commons has come to a resolution inconsistent with the Act; for, if the resolution and the Act are not inconsistent the plaintiff has obviously no grievance. We must of course face this supposition, and give our decision upon the hypothesis of its truth. But it would be indecent and improper to make the further supposition that the House of Commons deliberately and intentionally defies and breaks the statute-law. The more decent and I may add the more natural and probable supposition is, that, for reasons which are not before us, and of which we are therefore unable to judge, the House of Commons considers that there is no inconsistency between the Act and the resolution. They may think there is some implied exception to the Act. They may think that what the plaintiff proposes to do is not in compliance with its directions. With this we have nothing to do. Whatever may be the reasons of the House of Commons for their conduct, it would be impossible for us to do justice without hearing and considering those reasons; but it would be equally impossible for the House, with any regard for its own dignity and independence, to suffer its reasons to be laid before us for that purpose, or to accept our interpretation of the law in preference to its own. It seems to follow that the House of Commons has the exclusive power of interpreting the statute, so far as the regulation of its own proceedings within its own walls is concerned; and that, even if that interpretation should be erroneous, this Court has no power to interfere with it directly or indirectly. This view of the matter is well illustrated by another part of the Act.

By s. 4 certain persons are permitted to make a declaration or affirmation instead of taking an oath. The question whether this applied to persons permitted by 32 & 33 Vict. c. 68, s. 4, to make a promise instead of taking an oath, arose in the case of the plaintiff himself. It was considered by the House of Commons, and the House took a course which left the interpretation of the enactment to the Courts. It permitted the plaintiff to make the declaration, but declared that it did not intend to interfere with his liability to the statutory penalty if he did so. He made the declaration, took his seat accordingly, and was sued for the penalty. Though the proceedings in that action finally terminated in his favour, they established the proposition that s. 4 of the

Parliamentary Oaths Act did not authorize him in making a statutory declaration in lieu of taking an oath. (See *Clarke v. Bradlaugh*, (1881) 7 Q. B. D. 38, 61; *Bradlaugh v. Clarke*, (1883) 8 App. Cas. 354). This case appears to me to illustrate exactly the true relation between the House of Commons and this Court as regards the interpretation of statutes affecting them, and the effect of their resolutions on our proceedings.

A resolution of the House permitting Mr. Bradlaugh to take his seat on making a statutory declaration would certainly never have been interfered with by this Court. If we had been moved to declare it void and to restrain Mr. Bradlaugh from taking his seat until he had taken the oath, we should undoubtedly have refused to do so. On the other hand, if the House had resolved ever so decidedly that Mr. Bradlaugh was entitled to make the statutory declaration instead of taking the oath, and had attempted by resolution or otherwise to protect him against an action for penalties, it would have been our duty to disregard such resolutions, and, if an action for penalties were brought, to hear and determine it according to our own interpretation of the statute. Suppose, again, that the House had taken the view of the statute ultimately arrived at by this Court, that it did not enable Mr. Bradlaugh to make the statutory promise, we should certainly not have entertained an application to declare their resolution to be void. We should have said that, for the purpose of determining on a right to be exercised within the House itself, and in particular the right of sitting and voting, the House and the House only could interpret the statute; but that, as regarded rights to be exercised out of and independently of the House, such as the right of suing for a penalty for having sat and voted, the statute must be interpreted by this Court independently of the House.

This view of the subject is perhaps most simply and completely illustrated by the 4th section; but it seems to me to apply equally well to the 3rd, and I therefore think that we ought not to make the declaration asked for. I may observe, in conclusion, that, apart from these considerations, I should in any case whatever feel a reluctance almost invincible to declaring a resolution of the House of Commons to be beyond the powers of the House, and to be void. Such a declaration would in almost every imaginable case be unnecessary and disrespectful: I will not say that extraordinary circumstances might not require it, because it is impossible

to foresee every event which may happen. It is enough to say that the circumstances which would justify such a declaration must be extraordinary indeed, and that, even if relief had to be given in this case, I should think it sufficient to restrain the Serjeant-at-Arms from acting on the order of the House. I do not dwell upon this, however, as I wish to put my judgment on the plain and broad ground already stated.

That part of the prayer of the statement of claim which asks us to restrain the Serjeant-at-Arms from using force to prevent the plaintiff from entering the House, may be disposed of in a few words. The order is, to exclude the plaintiff from the House; and we cannot suppose that this means more than that the plaintiff is to be prevented by the use of such force as may be absolutely necessary for the purpose from entering such parts of the Houses of Parliament as the order applies to. We should not be warranted either in law or by the use of common experience in supposing that anything else was intended. If, however, this only is intended, I am of opinion that the use of such force is strictly justifiable. Every private man has the right of preventing a stranger from entering his house by such force, and of authorizing others to act for him if he is unable or unwilling to act for himself; and to say that the House has by law power to exclude one of its members from the House, but has not the power to direct the use of such force for that purpose would be contradictory.

Before leaving this part of the subject, I may observe that in my judgment the case before us differs widely from a possible case suggested in argument in *Burdett v. Abbot*, (1811) 14 East at p. 128, as to the effect of an order by the House of Commons to put a member to death or to inflict upon him bodily harm. Of such a case it is enough to say, as Lord Ellenborough said, that it will be time to decide it when it arises. The only force which comes in question in this case is, such force as any private man might employ to prevent a trespass on his own land. I know of no authority for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice. One of the leading authorities on the privilege of parliament contains matter on the point which shews how careful parliament has been to avoid even the appearance of countenancing such a doctrine. This is the case of *Sir John Eliot, Denzil Hollis, and Others*, of which a complete history is given in

8 Howell's State Trials, pp. 294-336. In this case the defendants were convicted in 1629 on an information before the Court of King's Bench for seditious speeches in parliament and also for an assault on the Speaker in the chair. They pleaded to the jurisdiction that these matters should be inquired into in Parliament and not elsewhere; and their plea was overruled. In 1666 this judgment was reversed upon writ of error; one error assigned being that the speaking of the seditious words and the assault on the Speaker were made the subject of one judgment; whereas the seditious speech, if made in parliament, could not be inquired into out of parliament, even if the assault upon the Speaker could be tried in the Court of King's Bench: hence there should have been two separate judgments. This case is the great leading authority, memorable on many grounds, for the proposition that nothing said in parliament by a member as such, can be treated as an offence by the ordinary Courts. But the House of Lords carefully avoided deciding the question whether the Court of King's Bench could try a member for an assault on the Speaker in the House.

The plaintiff argued his own case before us at length. It is due to him to state the reasons why his arguments do not convince me. He referred to a great number of authorities; but his argument was in substance short and simple. He said that the resolution of the House of Commons was illegal, as the House had no power to alter the law of the land by resolution; and, admitting that the House has power to regulate its own procedure, he contended that in preventing him from taking his seat, the House went beyond matter of internal regulation and procedure, as they deprived both him and the electors of Northampton of a right recognized by law, which ought to be protected by the law; and so inflicted upon him and them wrongs which would be without a remedy if we failed to apply one. I think that each part of this argument requires a plain, direct answer.

It is certainly true that a resolution of the House of Commons cannot alter the law. If it were ever necessary to do so, this Court would assert this doctrine to the full extent to which it was asserted in *Stockdale v. Hansard*. The statement that the resolution of the House of Commons was illegal must, I think, be assumed to be true, for the purposes of the present case. The demurrer for those purposes admits it. We decide nothing unless we decide that, even

if it is illegal in the sense of being opposed to the Parliamentary Oaths Act, it does not entitle the plaintiff to the relief sought. This admission, however, must be regarded as being made for the purposes of argument only. It would, as I have already said, be wrong for us to suggest or assume that the House acted otherwise than in accordance with its own view of the law; and, as we know not what that view is, nor by what arguments it is supported, we can give no opinion upon it. I do not say that the resolution of the House is the judgment of a Court not subject to our revision; but it has much in common with such a judgment. The House of Commons is not a Court of Justice; but the effect of its privilege to regulate its own internal concerns practically invests it with a judicial character when it has to apply to particular cases the provisions of Acts of Parliament. We must presume that it discharges this function properly and with due regard to the laws, in the making of which it has so great a share. If its determination is not in accordance with law, this resembles the case of an error by a judge whose decision is not subject to appeal. There is nothing startling in the recognition of the fact that such an error is possible. If, for instance, a jury in a criminal case give a perverse verdict, the law has provided no remedy. The maxim that there is no wrong without a remedy does not mean, as it is sometimes supposed, that there is a legal remedy for every moral or political wrong. If this were its meaning, it would be manifestly untrue. There is no legal remedy for the breach of a solemn promise not under seal and made without consideration; nor for many kinds of verbal slander, though each may involve utter ruin; nor for oppressive legislation, though it may reduce men practically to slavery; nor for the worst damage to person and property inflicted by the most unjust and cruel war. The maxim means only that legal wrong and legal remedy are correlative terms; and it would be more intelligibly and correctly stated, if it were reversed, so as to stand, 'Where there is no legal remedy, there is no legal wrong.'

The assertion that the resolution of the House goes beyond matter of procedure, and that it does in effect deprive both Mr. Bradlaugh himself and his constituents of legal rights of great value, is undoubtedly true if the word 'procedure' is construed in the sense in which we speak of civil procedure and criminal procedure, by way of opposition to the substantive law which

systems of procedure apply to particular cases. No doubt, the right of the burgesses of Northampton to be represented in parliament, and the right of their duly-elected representative to sit and vote in parliament and to enjoy the other rights incidental to his position upon the terms provided by law are in the most emphatic sense legal rights, legal rights of the highest importance, and in the strictest sense of the words. Some of these rights are to be exercised out of parliament, others within the walls of the House of Commons. Those which are to be exercised out of parliament are under the protection of this Court, which, as has been shewn in many cases, will apply proper remedies if they are in any way invaded, and will in so doing be bound, not by resolutions of either House of Parliament, but by its own judgment as to the law of the land, of which the privileges of Parliament form a part. Others must be exercised, if at all, within the walls of the House of Commons; and it seems to me that, from the nature of the case, such rights must be dependent upon the resolutions of the House. In my opinion the House stands with relation to such rights, in precisely the same relation as we the judges of this Court stand in to the laws which regulate the rights of which we are the guardians, and to the judgments which apply them to particular cases; that is to say, they are bound by the most solemn obligations which can bind men to any course of conduct whatever, to guide their conduct by the law as they understand it. If they misunderstand it, or (I apologize for the supposition) wilfully disregard it, they resemble mistaken or unjust judges; but in either case, there is in my judgment no appeal from their decision. The law of the land gives no such appeal; no precedent has been or can be produced in which any Court has ever interfered with the internal affairs of either House of Parliament, though the cases are no doubt numerous in which the Courts have declared the limits of their powers outside of their respective Houses. This is enough to justify the conclusion at which I arrive.

We ought not to try to make new laws, under the pretence of declaring the existing law. But I must add that this is not a case in which I at least feel tempted to do so. It seems to me that, if we were to attempt to erect ourselves into a Court of Appeal from the House of Commons, we should consult neither the public interest, nor the interests of parliament and the constitution, nor our own dignity. We should provoke a conflict between the House

of Commons and this Court, which in itself would be a great evil; and, even upon the most improbable supposition of their acquiescence in our adverse decision, an appeal would lie from that decision to the Court of Appeal, and thence to the House of Lords, which would thus become the judge in the last resort of the powers and privileges of the House of Commons.

For these reasons I am of opinion that there must be judgment for the defendant.

LORD COLERIDGE C.J. delivered judgment to the same effect. MATHEW J. concurred in LORD COLERIDGE C.J.'s judgment.

Judgment for the defendant.

WASON v. WALTER, (1868) L. R. 4 Q. B. 73

QUEEN'S BENCH

[This was an action for libel arising out of the following circumstances:—

The plaintiff had caused to be presented to the House of Lords a petition in which he made a charge against Sir Fitzroy Kelly, the recently-appointed Lord Chief Baron of the Exchequer. In the subsequent debate the plaintiff's charge was stigmatised as a 'slandrous, calumnious and unfounded statement.' These words were printed in a report of the debate published in the *Times* newspaper, of which the defendant was a proprietor. In the same issue appeared a leading article commenting adversely on the conduct of the plaintiff. The plaintiff brought an action for libel against the defendant on two counts: (1) in respect of the report, and (2) of the leading article.

At the trial before Cockburn C.J. the jury were directed that the publication of the libel charged in the first count was privileged, if they should find it to be a true and faithful report of the debate in the House of Lords, and that they should therefore find for the defendant; secondly, that they should find for the defendant, if they thought that the comments contained in the libel charged in the second count on the conduct of the plaintiff in presenting the petition to the House of Lords, and on the debate in the House of Lords, were fair comments and within the limits of fair criticism.

The jury having found on both counts for the defendant,

A rule was afterwards obtained for a new trial, for misdirection on both counts.]

The judgment of the Court (COCKBURN C.J., LUSH, HANNEN, and HAYES JJ.) was delivered by COCKBURN C.J.

COCKBURN C.J. [*After a few introductory remarks continued:*] The main question for our decision is, whether a faithful report in a public newspaper of a debate in either house of parliament, containing matter disparaging to the character of an individual, as having been spoken in the course of the debate, is actionable at the suit of the party whose character has thus been called in question. We are of opinion that it is not.

Important as the question is, it comes now for the first time before a court of law for decision. Numerous as are the instances in which the conduct and character of individuals have been called in question in parliament during the many years that parliamentary debates have been reported in the public journals, this is the first instance in which an action of libel founded on a report of a parliamentary debate has come before a court of law. There is, therefore, a total absence of direct authority to guide us. There are, indeed, dicta of learned judges having reference to the point in question, but they are conflicting and inconclusive, and having been unnecessary to the decision of the cases in which they were pronounced, may be said to be extrajudicial. In the case of *Rex v. Wright*, (1799) 8 T. R. 293, Lawrence J. placed the reports of parliamentary debates on the same footing with respect to privilege as is accorded to reports of proceedings in courts of justice, and expressed an opinion that the former were as much entitled to protection as the latter. But it is to be observed that in that case the question related to the publication by the defendant of a copy of a report of a committee of the House of Commons, which report the House had ordered to be printed, not to the publication of a debate unauthorized by the House. Again, in *Davison v. Duncan*, (1857) 7 E. & B. 229, 232, Wightman J. seems disposed to treat the reports of proceedings in parliament as entitled to the same privilege as reports of proceedings in courts of justice. But here again the question before the Court had reference to a report, not of a proceeding in parliament, but of proceedings at a public meeting of improvement commissioners of a particular locality, in which the conduct of an individual had been assailed, and which report the Court held not to be privileged, without being in any way called upon to determine how far the privilege would have extended to a report of proceedings in parlia-

ment. On the other hand, in *Stockdale v. Hansard*, (1839) 9 A. & E. 181-186; 212-214, Littledale J. and Patteson J. use language from which it may be safely inferred that they would have deemed the report of a parliamentary debate, if containing an attack on character, as not entitled to be held privileged in an action for libel. But here again the question was not how far the publication of parliamentary debates was privileged, but solely whether an order of the House of Commons directing a paper, forming no part of the proceedings of the House, and containing libellous matter, to be printed and sold to the public, and a resolution of the House that such an order was within its privileges, protected the publisher of the paper from an action of libel. Any opinion expressed on the subject of the report of parliamentary debates was therefore beyond the scope of the inquiry, and must be considered as more or less extrajudicial.

Several cases were cited in the course of the argument before us, but they turned for the most part on the question of parliamentary privilege, and therefore appear to us very wide of the present question. The case of *Rex v. Wright* approached nearest to the one before us. In that case a committee of the House of Commons having made a report imputing to Horne Tooke seditious and revolutionary designs after his acquittal on a trial for high treason, and the House having ordered the report to be printed for the use of its members, the defendant, a bookseller and publisher, printed and published copies of the report. On an application for a criminal information the Court refused the rule, apparently on the ground that the report of a committee of the House of Commons, approved of by the House, being part of the proceedings of parliament, could not possibly be libellous. Lord Kenyon C.J. says, 'This report was first made by a committee of the House of Commons, then approved by the House at large, and then communicated to the other House, and it is now sub judice; and yet it is said that this is a libel on the prosecutor. It is impossible for us to admit that the proceeding of either of the houses of parliament is a libel; and yet that is to be taken as the foundation of this application.' Lord Kenyon and his colleagues appear to have thought that a paper, though containing matter reflecting on the character of an individual, if it formed part of the proceedings of the House of Commons, would be so divested of all libellous character as that a party publishing it, even without the authority

of the House, would not be responsible at law for the defamatory matter it contained. If this doctrine could be upheld, it would have a manifest bearing on the present question, for as no speech made by a member of either house, however strongly it may assail the conduct or character of others, can be held to be libellous, it would follow, such a speech being a parliamentary proceeding, that the publication of it would not be actionable. But this is directly contrary to the decision in *Rex v. Lord Abingdon*, (1794) 1 Esp. 226, and *Rex v. Creevey*, (1818) 1 M. & S. 273, in which the publication of speeches made in parliament reflecting on the character of individuals was held to be actionable. And it must be admitted that the authority of the case of *Rex v. Wright* is much shaken, not only by the decision of *Rex v. Creevey*, but also by the observations made by Lord Ellenborough in his judgment in the latter case.

Beyond, however, impugning the authority of *Rex v. Wright*, the two last-mentioned cases afford little assistance towards the solution of the present question. There is obviously a very material difference between the publication of a speech made in parliament for the express purpose of attacking the conduct or character of a person, and afterwards published with a like purpose or effect, and the faithful publication of parliamentary debates in their entirety, with a view to afford information to the public, and with a total absence of hostile intention or malicious motive towards any one.

The case of *Lake v. King*, (1668) 1 Saund. 131, which was cited in the argument before us, has no application to the present case. There, a petition having been presented to the House of Commons by the defendant, impugning the conduct of the plaintiff, copies of the petition had been printed and circulated among the members of the house, and it was held that, the printing and circulating petitions being according to the course and usage of parliament, no action would lie.

The case of *Stockdale v. Hansard*, which was much pressed upon us by the counsel for the defendant, is in like manner beside the question. [*His Lordship summarised the facts in Stockdale v. Hansard.*]

To the decision of this Court in that memorable case we give our unhesitating and unqualified adhesion. But the decision in that case has no application to the present. The position, that an

order of the House of Commons cannot render lawful that which is contrary to law, still less that a resolution of the House can supersede the jurisdiction of a court of law by clothing an unwarranted exercise of power with the garb of privilege, can have no application where the question is, not whether the act complained of, being unlawful at law, is rendered lawful by the order of the House or protected by the assertion of its privilege, but whether it is, independently of such order or assertion of privilege, in itself privileged and lawful.

Decided cases thus leaving us without authority on which to proceed in the present instance, we must have recourse to principle in order to arrive at a solution of the question before us, and fortunately we have not far to seek before we find principles in our opinion applicable to the case, and which will afford a safe and sure foundation for our judgment.

It is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible.

The immunity thus afforded in respect of the publication of the proceedings of courts of justice rests upon a twofold ground. In the English law of libel, malice is said to be the gist of an action for defamation. And though it is true that by malice, as necessary to give a cause of action in respect of a defamatory statement, legal, and not actual malice, is meant, while by legal malice, as explained by Bayley J. in *Bromage v. Prosser*, (1825) 4 B. & C. at p. 255, is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act without any proof of malice in fact, yet the presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published, and, if this should be the case, though the character of the party concerned may have suffered, no right of action will arise. 'The rule,' says Lord Campbell C.J. in the case of *Taylor v. Hawkins*, (1851) 16 Q. B. at p. 321, 'is that, if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice.'

It is thus that in the case of reports of proceedings of courts of justice, though individuals may occasionally suffer from them, yet,

as they are published without any reference to the individuals concerned, but solely to afford information to the public and for the benefit of society, the presumption of malice is rebutted, and such publications are held to be privileged.

The other and the broader principle on which this exception to the general law of libel is founded is, that the advantage to the community from publicity being given to the proceedings of courts of justice is so great, that the occasional inconvenience to individuals arising from it must yield to the general good. It is true that with a view to distinguish the publication of proceedings in parliament from that of proceedings of courts of justice, it has been said that the immunity accorded to the reports of the proceedings of courts of justice is grounded on the fact of the courts being open to the public, while the houses of parliament are not; as also that by the publication of the proceedings of the courts the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But in our opinion the true ground is that given by Lawrence J. in *Rex v. Wright*, namely, that 'though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings.'

[*His Lordship quoted similar extracts from Davison v. Duncan.*]

Both the principles, on which the exemption from legal consequences is thus extended to the publication of the proceedings of courts of justice, appear to us to be applicable to the case before us. The presumption of malice is negatived in the one case as in the other by the fact that the publication has in view the instruction and advantage of the public, and has no particular reference to the party concerned. There is also in the one case as in the other a preponderance of general good over partial and occasional evil.

[*The publication of Parliamentary proceedings is of paramount national importance, since it promotes public confidence in the legislature and institutions of the country, facilitates the working of the representative system, and safeguards the right of the subject to petition on all measures pending in Parliament. It is undesirable to*

withhold from publication even those proceedings in which the character of individuals is impugned. Publishers would be placed in a very difficult position if every debate had had to be scanned to see whether it contained defamatory matter. Above all, the nation has a right to be informed of all that relates to the conduct of public servants. Of this there could be no better illustration than the present case.]

The learned counsel for the plaintiff scarcely ventured as of his own assertion to deny that the benefit to the public from having the debates in parliament published was as great as that which arose from the publishing of the proceedings of courts of justice, but he relied on the dicta of Littledale J. and Patteson J. in *Stockdale v. Hansard*, and on the opinions of certain noble and learned lords in the course of debates in the House of Lords on bills introduced by Lord Campbell for the purpose of amending the law of libel (1848: Hansard's Parliamentary Debates, 3rd series, vol. lxx., pp. 1254-8; and in 1858 see vol. cxlix., pp. 947-82). There is no doubt that in delivering their opinions in *Stockdale v. Hansard*, the two learned judges referred to denied the necessity and in effect the public advantage of the proceedings in parliament being made public. The counsel for the defendant in that case having insisted, as a reason why the power to order papers to be printed and published should be considered within the privileges of the House of Commons, on the advantage which resulted from the proceedings of parliament being made known, the two learned judges, not satisfied with demonstrating, as they did, by conclusive arguments, that the House had not the power to order papers of a libellous character and forming no part of the proceedings of the House to be published, still less to conclude the legality of such a proceeding by the assertion of privilege, thought it necessary to follow the counsel into the question of policy and convenience and in so doing took what we cannot but think a very short-sighted view of the subject. This is the more to be regretted, as their observations apply not only to the printing of papers by order of the House, the only question before them, but also to the publication of parliamentary proceedings in general, the consideration of which was not before them, and therefore was unnecessary. Lord Denman, in his admirable judgment, than which a finer never was delivered within these walls, and in which the spirit of Holt is combined with the luminous reasoning of

a Mansfield, while overthrowing by irresistible arguments the positions of the Attorney General, was content to answer the argument as to the policy of allowing papers to be published by order of either of the houses of parliament, not by denying the policy of giving power to the House to order the printing and publishing of papers, but by saying that such power must be provided for by legislation. On the subject of the publication of parliamentary debates he said nothing, nor was he called upon to say anything. That the Legislature did not concur with the two judges in their view of the policy is manifest from the Act of 3 Vict. c. 9, passed in consequence of the decision in *Stockdale v. Hansard*. [*He quoted the preamble and stated the effect of the Act.*]

As regards the attempt of Lord Campbell to fix the legality of the publication of parliamentary debates on the sure foundation of statutory enactment, we think it may be as well accounted for by the apprehension, as to the result of any proceeding at law in which the legality of such publication should come in question, produced in his mind by the language of the judges in *Stockdale v. Hansard*, as by any conviction of the defectiveness of the law.

[*The views expressed in debate in the House of Lords are not conclusive, for the House had not the advantage of hearing forensic discussion.*]

We, however, are glad to think that, on closer inquiry, the law turns out not to be as on some occasions it has been assumed to be. To us it seems clear that the principles on which the publication of reports of the proceedings of courts of justice have been held to be privileged apply to the reports of parliamentary proceedings. The analogy between the two cases is in every respect complete. If the rule has never been applied to the reports of parliamentary proceedings till now, we must assume that it is only because the occasion has never before arisen. If the principles which are the foundation of the privilege in the one case are applicable to the other, we must not hesitate to apply them, more especially when by so doing we avoid the glaring anomaly and injustice to which we have before adverted. Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying condi-

tions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or ex officio informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties? Again, the recognition of the right to publish the proceedings of courts of justice has been of modern growth. Till a comparatively recent time the sanction of the judges was thought necessary even for the publication of the decisions of the courts upon points of law. Even in quite recent days judges, in holding publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what are called ex parte proceedings as a probable exception from the operation of the rule. Yet ex parte proceedings before magistrates, and even before this Court, as, for instance, on applications for criminal informations, are published every day, but such a thing as an action or indictment founded on a report of such an ex parte proceeding is unheard of, and if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is, not whether the report was or was not ex parte, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected.

It is to be observed that the analogy between the case of reports of proceedings of courts of justice and those of proceedings in parliament being complete, all the limitations placed on the one

to prevent injustice to individuals will necessarily attach on the other: a garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection. Our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose or with the effect of injuring an individual will be unlawful, as was held in the cases of *Rex v. Lord Abingdon*, and *Rex v. Creevey*. At the same time it may be as well to observe that we are disposed to agree with what was said in *Davison v. Duncan*, as to such a speech being privileged if bona fide published by a member for the information of his constituents. But whatever would deprive a report of the proceedings in a court of justice of immunity will equally apply to a report of proceedings in parliament.

It only remains to advert to an argument urged against the legality of the publication of parliamentary proceedings, namely, that such publication is illegal as being in contravention of the standing orders of both houses of parliament. The fact, no doubt, is, that each house of parliament does, by its standing orders, prohibit the publication of its debates. But, practically, each house not only permits, but also sanctions and encourages, the publication of its proceedings, and actually gives every facility to those who report them. Individual members correct their speeches for publication in *Hansard* or the public journals, and in every debate reports of former speeches contained therein are constantly referred to. Collectively, as well as individually, the members of both houses would deplore as a national misfortune the withholding their debates from the country at large. Practically speaking, therefore, it is idle to say that the publication of parliamentary proceedings is prohibited by parliament. The standing orders which prohibit it are obviously maintained only to give to each house the control over the publication of its proceedings, and the power of preventing or correcting any abuse of the facility afforded. Independently of the orders of the houses, there is nothing unlawful in publishing reports of parliamentary proceedings. Practically, such publication is sanctioned by parliament; it is essential to the working of our parliamentary system, and to the welfare of the nation. Any argument founded on its alleged illegality appears to us, therefore, entirely to fail. Should either house of parliament ever be so ill-advised as to prevent its pro-

ceedings from being made known to the country—which certainly never will be the case—any publication of its debates made in contravention of its orders would be a matter between the house and the publisher. For the present purpose, we must treat such publication as in every respect lawful, and hold that, while honestly and faithfully carried on, those who publish them will be free from legal responsibility, though the character of individuals may incidentally be injuriously affected.

So much for the great question involved in this case. We pass on to the second branch of this rule, which has reference to alleged misdirection in respect of the second count of the declaration, which is founded on the article in the *Times* commenting on the debate in the House of Lords and the conduct of the plaintiff in preferring the petition which gave rise to it. We are of opinion that the direction given to the jury was perfectly correct. The publication of the debate having been justifiable, the jury were properly told the subject was, for the reasons we have already adverted to, pre-eminently one of public interest, and therefore one on which public comment and observation might properly be made, and that consequently the occasion was privileged in the absence of malice. As to the latter the jury were told that they must be satisfied that the article was an honest and fair comment on the facts,—in other words, that, in the first place, they must be satisfied that the comments had been made with an honest belief in their justice, but that this was not enough, inasmuch as such belief might originate in the blindness of party zeal, or in personal or political aversion; that a person taking upon himself publicly to criticize and to condemn the conduct or motives of another, must bring to the task, not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what a jury shall deem, under the circumstances of the case, a fair and legitimate criticism on the conduct and motives of the party who is the object of censure.

Considering the direction thus given to have been perfectly correct, we are of opinion that in respect of the alleged misdirection as also on the former point, the ruling at *nisi prius* was right, and that consequently this rule must be discharged.

Rule discharged.

IV

TAXATION

TAXATION in England must be authorized by statute. The imposition of taxes is really a variety of legislation, and is therefore part of the exclusive province of parliament. *Bates's Case*, *Darnel's Case*, and *R. v. Hampden* all have to do with this topic, but they have been considered rather with reference to the general theory of Prerogative. The law now rests on the Bill of Rights, and is not open to any doubt whatever. This was shown in the case of *A.-G. v. Wilts United Dairies* (p. 119 below), a case not unlike *Bates's Case*, for in both it was attempted to justify taxation by virtue of an undoubted power to regulate trade.

Stockdale v. Hansard too is not without a parallel: in *Bowles v. Bank of England*, [1913] 1 Ch. 57, the plaintiff succeeded in recovering income tax which had been illegally exacted under the authority of a resolution of the House of Commons. The judgment turned almost entirely on the construction of technical statutes, and no real attempt was made to establish any broad general principle. Parker J. said (at p. 84):

'This question may be stated as follows: Does a resolution of the Committee of the House of Commons for Ways and Means, either alone or when adopted by the House, authorize the Crown to levy on the subject an income tax assented to by such resolution but not yet imposed by Act of Parliament? Apart from the effect of certain provisions contained in the statutes relating to the collection of income tax, to which I shall presently refer, this question can, in my opinion, only be answered in the negative. By the statute 1 W. & M., usually known as the Bill of Rights, it was finally settled that there could be no taxation in this country except under authority of an Act of Parliament. The Bill of Rights still remains unrepealed, and no practice or custom, however prolonged, or however acquiesced in on the part of the subject, can be relied on by the Crown as justifying any infringement of its provisions. It follows that, with regard to the powers of the Crown to levy taxation, no resolution, either of the Committee for Ways and Means or of the House itself, has any legal effect whatever. Such resolutions are necessitated by a parliamentary procedure adopted with a view to the protection of the subject against the hasty imposition of taxes, and it would be strange

to find them relied on as justifying the Crown in levying a tax before such tax is actually imposed by Act of Parliament.

‘I did not, however, understand that the Attorney-General on behalf of the Crown really dissented from this position.’

Once the House of Commons had, by the Parliament Act, 1911, (1 & 2 Geo. 5, c. 18), secured the full and exclusive control of taxation, there was no reason why taxation should not be levied at once under the authority of a resolution of the House. The Provisional Collection of Taxes Act was therefore passed in 1913 (8 Geo. 5, c. 8), allowing this in the case of customs, excise, and income tax, but with the proviso (*inter alia*) that the tax should be invalid, unless authorized by Act of Parliament within four months after the resolution.

CASE

✓ ATTORNEY-GENERAL v. WILTS UNITED DAIRIES,
(1921) 37 T. L. R. 884

COURT OF APPEAL

[By s. 3 of the New Ministries and Secretaries Act, 1916, (6 and 7 Geo. 5, c. 68), the office of Food Controller was created, and by the combined effect of s. 4 of that Act and Regulation 2 r of the Defence of the Realm Regulations the Food Controller was empowered to 'make orders regulating or giving directions with respect to the production, manufacture, treatment, use, consumption, transport, storage, distribution, supply, sale or purchase of, or other dealing in or measures to be taken in relation to any article (including orders providing for the fixing of maximum and minimum prices), when it appears to him necessary or expedient to make any such order for the purpose of encouraging or maintaining the food supply of the country, and that he should have power to require all persons owning any article to place the whole of the stock under his control. By virtue of these powers he issued orders providing (*inter alia*) that excepting under licence no milk should be either purchased within an area comprising the counties of Somerset, Devon, Dorset, and Cornwall, or brought outside that area for distribution. The appellant Company desiring to deal in milk, he accordingly granted them licences, but only on condition that they should agree to pay to him twopence for every gallon of milk purchased. This condition was alleged to be imposed for the purpose of regulating prices and securing an equitable distribution of milk in different parts of the country. The Company made an agreement (which formed part of the licence) accepting this condition, but afterwards refused to pay.

The Attorney-General laid an information against the Company, claiming £15,027 4s. 6d. the amount due to the Food Controller in respect of milk purchased by them under the licences aforesaid. Bailhache J. gave judgment for the Attorney-General for the amount claimed. From this decision the Company appealed.]

LORD JUSTICE ATKIN, in his judgment, said:—

The question of law that arises is whether the Food Controller

had any legal authority for requiring the defendants to agree to pay the sums in question as a condition of the licence required. There is and can be no suggestion that the charge made in this case is part of a price payable by the defendants for milk bought by them. The Food Controller never had any property in or disposing power over any of the milk in question—he neither sold nor delivered any part of the milk. The whole of the price which could be lawfully demanded by the producers was paid to them by the defendants under contracts of sale made between the producers and the defendants. The present charge is in respect of money claimed on behalf of the Crown by the Food Controller as a condition of a grant of a licence. It could not be disputed that the Food Controller could only acquire the right to make such a charge by statutory authority. No power to make a charge upon the subject for the use of the Crown could arise except by virtue of the prerogative or by statute, and the alleged right under the prerogative was disposed of finally by the Bill of Rights (1 W. and M., sess. 2, c. 2). It may be convenient at this stage to remind ourselves of this statute, an act for declaring the rights and liberties of the subject. After reciting that the late King, by the assistance of divers evil counsellors, judges, and ministers, employed by him, did endeavour to subvert and extirpate . . . the laws and liberties of this kingdom . . . by levying money for and to the use of the Crown by pretence of prerogative for other time and in other manner than the same was granted by Parliament . . . all of which are utterly and directly contrary to the known laws and statutes and freedom of this realm, the lords and commons declare that levying money for or to the use of the Crown [as above] is illegal; and pray that it may be declared and enacted that all and singular the rights and liberties asserted and claimed in the above declaration are the true ancient and indubitable rights and liberties of the people of this kingdom and shall be strictly holden and observed . . . and all officers and ministers whatsoever shall serve their Majesties and their successors according to the same in all times to come, all which their Majesties are contented and pleased shall be declared and enacted and established by authority of this present Parliament and shall stand, remain and be the law of this realm for ever, and the same are by their said Majesties by and with the advice and consent, &c., declared, enacted and established accordingly. Though the attention of our ancestors

was directed especially to abuses of the prerogative, there can be no doubt that this statute declares the law that no money shall be levied for or to the use of the Crown except by grant of Parliament. We know how strictly Parliament has maintained this right—and, in particular, how jealously the House of Commons has asserted its predominance in the power of raising money. An elaborate custom of Parliament has prevailed by which money for the service of the Crown is only granted at the request of the Crown made by a responsible Minister and assented to by a resolution of the House in Committee. By constitutional usage no money proposal can be altered by the Second Chamber, whose powers are confined to acceptance or rejection. Similar elaborate checks exist in respect to authority for expenditure of the public revenue, both in respect to obtaining the statutory authority to expend money and to obtaining the executive acts necessary to place the money at the disposal of the spending authority.

In these circumstances, if an officer of the executive seeks to justify a charge upon the subject made for the use of the Crown (which includes all the purposes of the public revenue), he must show, in clear terms, that Parliament has authorized the particular charge. The intention of the Legislature is to be inferred from the language used, and the grant of powers may, though not expressed, have to be implied as necessarily arising from the words of a statute; but in view of the historic struggle of the Legislature to secure for itself the sole power to levy money upon the subject, its complete success in that struggle, the elaborate means adopted by the Representative House to control the amount, the conditions and the purposes of the levy, the circumstances would be remarkable indeed which would induce the Court to believe that the Legislature had sacrificed all the well-known checks and precautions, and, not in express words, but merely by implication, had entrusted a Minister of the Crown with undefined and unlimited powers of imposing charges upon the subject for purposes connected with his department.

I am clearly of opinion that no such powers, and indeed no powers at all, of imposing any such charge are given to the Minister of Food by the statutory provisions on which he relies. I will express no opinion upon the Defence of the Realm Consolidation Act, 1914, itself, whether the provisions of the statute should be construed as authorizing regulations to be made giving

the executive power to impose charges upon the subject. But I am satisfied that the powers given by regulation 2 F include no such powers. There are clearly no express words, and all the powers given appear capable of performance without any power to levy money. It is indeed significant that it was thought necessary to give expressly even such a power as that of fixing maximum and minimum prices. It may be observed that in 1916 by regulation 2 E very similar powers were given to the Admiralty, Army Council, or Air Council, or to the Minister of Munitions, who 'may, by order regulate, restrict, or prohibit the manufacture, use, purchase, sale, repair, delivery of, or payment for, or other dealing in, any war material, food, forage, or stores of any description, or any article required for or in connexion with the production thereof.' If this power existed, there has been hardly any article of any description in connexion with the production or distribution of which charges might not have been made by some one or more of the executive officers of State. Naturally, counsel for the Food Minister disclaimed any wide powers. But no limit was suggested which appeared to afford any logical basis. There seems no reason why the Food Controller should have limited his charge to 2d. He might have indirectly prohibited transactions by making the charge 3d. or more; he might have put a duty on milk transferred from one county to another to be collected at the county boundary; he might have imposed a duty on the profits of those licensed, either on the profits derived from the licensed dealings or generally. In none of these matters would Parliament have had any voice in the time or manner of the levy of the money; and for that reason, in my opinion, all such imposts would have been illegal.

The Solicitor-General urged that while it was true that a licensing authority may not require a money payment for public uses, in excess of amounts fixed in accordance with statute, as a condition of its licence, yet here the subject had no right to a licence, and therefore the Food Controller might make his own conditions. The answer is that he may not, if one of those conditions amounts to levying money for or to the use of the Crown.

It makes no difference that the obligation to pay the money is expressed in the form of an agreement. It was illegal for the Food Controller to require such an agreement as a condition of any licence. It was illegal for him to enter into such an agreement. The agreement itself is not enforceable against the other contract-

ing party; and if he had paid under it he could, having paid under protest, recover back the sums paid, as money had and received to his use. I say nothing as to the alleged purposes to which the money so raised was destined, except to point out that the vagueness of the intention to 'apply it later for the benefit of the public by a reduction of prices of milk or milk products or in some similar way' illustrates the wisdom of Parliament in retaining, in its own hands, the control of the expenditure of public money. I have no doubt whatever as to the good faith of the Food Controller. His intentions in making this charge may have been excellent, but he adopted methods which, in my opinion, are unconstitutional and contrary to law, and his agreements cannot be enforced.

I agree, therefore, that the appeal should be allowed, and judgment on the information entered for the defendants.

BANKES and SCRUTTON L.JJ. delivered judgments to the same effect.

Appeal allowed.

[On appeal to the House of Lords this decision was affirmed. (91 L. J. (K. B.) 897 and 38 T. L. R. 781.)]

JUDICIAL CONTROL OF PUBLIC AUTHORITIES

IN promoting the general interest of the community, the Government of a modern State finds itself constantly obliged to invade the vested rights of its subjects. To take but one example, the improvement of public health by the clearance of slum areas could hardly be carried out unless the State were able, in default of agreement, to apply some measure of compulsion to the owners of insanitary premises. The conflicting interests of the community and its members must indeed be subjected to a continuous process of adjustment, which cannot be left to the arbitrary action of either, but must be conducted in accordance with some law or general principle.

In England, any person—whether he be a private individual or a public officer makes no difference—who interferes with the private rights of the subject renders himself liable to an action in tort, unless he can justify his act by putting forward a defence recognized by law. Only the Crown itself is immune from legal process, and this immunity, as will be explained in the next section of this work, though productive of considerable inconveniences to the subject who has been wronged by the central government, does not protect the actual servant of the Crown who commits a tort, even though he may have acted by command of the Crown. Moreover, it was settled once and for all in the great constitutional struggle of the seventeenth century—which was fought round this very problem of the relations between the public and the private interest, or between government and property, as they were called at the time—that the mere plea of act of State is not a legal defence to an action in tort. In other words, it is not open to any public officer to defend himself by alleging generally that he has acted in the public interest. He must point to some specific authorization either at common law or by statute. This rule has remained in full force to the present day (see *Entick v. Carrington*, p. 145 below). It rests with the Courts to determine as a matter of law whether or no such an authorization exists. Government in this country is carried on in virtue of specific powers the nature and limits of which are within the cognizance of courts of law.

Thus the relations between private rights and public interest are in England legal relations, and as the process of adjusting them involves changes in the law, the ultimate control of that process is in

the hands of Parliament. It is right that policy should be determined by persons who, while they represent the people at large, are not unmindful, as private individuals, of vested interests; they provide that element of consent which is demanded by the spirit of the common law, and without which all government is apt to degenerate into organized tyranny.

The control which the judges exercise is subordinate to that of Parliament. They have no concern with policy, but only with legality. If Parliament has decided on a policy of interference, and has given to public authorities the necessary powers, the duty of the judges is restricted to keeping those authorities within the powers so conferred.

But this task is of no little importance. The statute which has conferred the powers in question must be interpreted, and on the interpretation much depends. The Courts will not hold, in the absence of express words or necessary implication, that Parliament, in authorizing a particular course of action, intended that the private rights of the subject should be interfered with. There is always a presumption in such cases in favour of the subject and against the public authority.¹ Let us take a familiar example, such as occurs every day. A corporation created by statute can do only what is within the powers granted to it by the statute. If it exceeds those powers it acts *ultra vires*. If therefore new powers are given by a statute to a statutory corporation—and most of our modern public authorities are statutory corporations—it is possible that either of two things has happened: either the legislature has authorized an interference with private rights which would otherwise have been unlawful, or it has merely authorized some act which, while otherwise open to no objection on the score of illegality, would have been *ultra vires* of the corporation to perform. Wherever it is possible to hold that a statute conferring powers was intended merely to cure a disability of this kind, and not to authorize an interference with private rights, the Courts will do so (*Metropolitan Asylum District v. Hill*, p. 154 below).

So also, the interference authorized by the statute will be confined within the narrowest possible limits; the legislature will never be deemed to have given the public authority *carte blanche* to carry out the interference in whatever way it likes. Thus an authorization to

¹ For a protest by Professor Laski against this method of interpretation, see *Report of Committee on Ministers' Powers*, (1932, Cmd. 4060), pp. 135-7.

carry out certain works which necessarily interfere with private rights will not excuse a negligent interference which causes unnecessary injury to the subject. This is one of the points involved in the great case of the *Mersey Docks Trustees v. Gibbs* (p. 156 below).

The Courts could not effectively protect the private person against the unauthorized inroads of government if they were not independent of all executive authority. Judges of inferior courts, such as county court judges and justices of the peace, are indeed entirely dependent on the Lord Chancellor in his executive capacity, being appointed by him and removable by him at his discretion. But no inconvenience arises from this cause, for the judicial decisions of inferior courts are always subject to review by the superior courts, and the members of these, although appointed by the Crown, are, once appointed, entirely independent of the executive. All the judges of the High Court and Court of Appeal and the Lords of Appeal in Ordinary hold their offices during good behaviour, subject to a power of removal by the King on an address presented to him by both Houses of Parliament (Supreme Court of Judicature (Consolidation) Act, 1925, 15 & 16 Geo. 5, c. 49, s. 12). That is to say, they cannot be removed except by a process closely analogous to legislation. The Lord Chancellor, however, being an executive as well as a judicial officer, retires with a change of government.

All the arguments in favour of judicial independence of the executive likewise justify judicial immunity from harassing suits brought by disappointed private litigants. Judges of the Supreme Court may be sued under the Habeas Corpus Act, 1679, for a penalty of £500 if they wrongfully refuse to issue a writ of Habeas Corpus in vacation; but with this exception all judges of superior and inferior courts are completely immune from all proceedings, civil and criminal, in respect of acts done by them in the exercise of their judicial functions and within the limits of their jurisdiction, even though they have acted maliciously (*Anderson v. Gorrie*, p. 168 below). For this purpose judges of superior courts are deemed never to exceed their jurisdiction, and their immunity is therefore absolute. A judge of an inferior court will be deemed not to have exceeded his jurisdiction where he has been led to exercise jurisdiction mistakenly by false allegations of fact, which, if true, would have given him jurisdiction (per Patteson J. in *Houlden v. Smith*, (1850) 14 Q. B. at p. 851). It is otherwise if he has assumed jurisdiction upon a mistaken view of the law.

Juries also enjoy absolute immunity in respect of their verdicts (*Bushell's Case*, p. 170 below); and parties (*Astley v. Younge*, (1759) 2 Burr. 807), witnesses (*Seaman v. Netherclift*, (1876) 2 C. P. D. 58), and advocates (*Munster v. Lamb*, (1888) 11 Q. B. D. 588) in respect of words said by them in the course of judicial proceedings.

The need for strict impartiality demands also that justice shall as far as possible be administered in public. The importance of this principle can hardly be exaggerated. The high degree of immunity enjoyed by the judiciary could not be allowed to remain were it not accompanied by this check on judicial corruption and oppression. Proceedings can be held *in camera* only in very exceptional circumstances, and even then never at the mere discretion of the judge. In every case an absolute necessity for secrecy must be established. The rule of publicity gives way only where, in the words of Lord Haldane, 'justice could not be done at all if it had to be done in public' (*Scott v. Scott*, [1913] A. C. at p. 438).

Readers of Dicey's *Law of the Constitution* are left in no doubt as to the importance of the action in tort as a method of controlling public authorities. Not only does it afford pecuniary compensation to persons whose private rights have been infringed, but it also tends to deter public officers from exceeding their powers. But its importance should not be over-emphasized. It is not always applicable, and it is not the only remedy.

In the first place, all public authorities have the benefit of the Public Authorities Protection Act, 1893 (p. 213 below). This Act, which indeed applies to other proceedings besides actions for damages, not only allows public authorities to tender amends, and penalizes in costs plaintiffs who neglect to give them an opportunity to do so, but awards solicitor and client costs to any public authority which succeeds in its defence. Moreover, any person who has a grievance against such an authority will find his remedy inapplicable after the very short period of six months. The policy of the Act is thus stated by Lord Shaw of Dunfermline in *Bradford Corporation v. Myers*, [1916] 1 A. C. at p. 260:

'By the limitation which it imposes it prevents belated and in many cases unfounded actions. In this way it, *pro tanto*, allows a safer periodical budget, prevents one generation of ratepayers from being saddled with the obligations of another, and secures steadiness in municipal and local accounting.'

Like all statutes of limitations, the Act does not make an unlawful act lawful, nor, within the period of limitation, does it oust the jurisdiction of the Courts; and its operation is further restricted to such unlawful acts as are committed bona fide in the execution of the duty imposed upon the authority. None the less, in its application many difficulties and obscurities have been encountered which make it a more serious obstacle to plaintiffs than would otherwise appear. The time is ripe for an amendment of this and other statutes of limitations (see 42 L. Q. R. 296).

The whole topic of liability for non-feasance is very complicated, and is best left to be considered in works on the law of torts (see especially, for the effects of non-fulfilment of a statutory duty, Radcliffe and Miles, *Cases on the Law of Torts*, p. 551). The exceptions to the general liability for misfeasance are, however, of considerable interest to the constitutional lawyer. They are neither few nor unimportant.

Even at Common Law an officer executing warrants or other process of a court of law was protected. According to English law, if one man breaks the law in obedience to the commands of another, both are responsible; the plea of superior orders will not release the subordinate from liability. In strict conformity with this principle, a sheriff who levied execution on a judgment would do so at his peril, for should the judgment prove to be invalid, it would afford him no defence to an action of trespass. But at this rate no judgment would ever be executed, at least not until the period had elapsed within which the unsuccessful defendant is at liberty to appeal. So the Common Law has assimilated the position of such ministerial officers to that of the judge himself. They are liable only if, on the face of it, the order given them was clearly outside the jurisdiction of the Court (*The Case of the Marshalsea*, p. 212 below). This exemption has been carried still farther by statute. By the Constables Protection Act, 1751, (24 Geo. 2, c. 44), constables who act in obedience to the warrant of a magistrate are rendered immune from action, even though the magistrate has acted without jurisdiction. 'In such cases, therefore,' said Lord Eldon C.J. in *Price v. Messenger*, (1800) 2 B. & P. at p. 161, 'the law has provided that the remedy of the party grieved shall be confined to the magistrate, as well where he has granted a warrant without having jurisdiction, as where the warrant which he has granted is improper.'

This statute is some recognition of the necessity for allowing the

plea of superior orders where the defendant is under a duty of obedience. That there is a tendency even at Common Law to relieve soldiers from the consequences of wrongful acts done under the orders of a superior officer is shown by the case of *Reg. v. Smith* (p. 348 below). But this was a criminal case, in which it was necessary to bring home to the prisoner a guilty intent; this was impossible in view of the fact that he had acted in obedience to superior orders which were not manifestly illegal. *Non constat* that he would have escaped civil liability.

But Parliament has gone yet farther in the direction of protecting officials who have acted wrongfully in the bona fide execution of their duty. Thus customs and inland revenue officials and officers engaged in enforcing the provisions of the Foreign Enlistment Act are by statute exempted from liability where there is probable cause for the seizure and detention of property.

Justices of the Peace also are specially protected by the terms of the Justices' Protection Act, 1848 (Jervis's Act). They are liable for acts done within their jurisdiction only if it is proved that they have acted maliciously and without reasonable and probable cause. Where they have acted without jurisdiction, they are liable without proof of malice or absence of reasonable and probable cause, but no action may be brought for anything done under a conviction or order of theirs until the conviction or order has been set aside. In connexion with acts done within their jurisdiction, it should be noted that where a Justice of the Peace exercises strictly judicial and not administrative or quasi-judicial functions, he is entitled to the same absolute immunity as any other judge of an inferior court (*Law v. Llewellyn*, [1906] 1 K. B. 487).

This distinction between the liability of Justices of the Peace in respect of their judicial acts and their liability in respect of their administrative or quasi-judicial acts rests upon statute. The common law draws its distinction in a different way, namely, between members of courts and persons who, while exercising judicial or quasi-judicial functions, are not members of courts. Whereas a judge is completely immune from action, so long as he keeps within the limits of his jurisdiction, any person who is not a member of a court is liable to an action if he acts maliciously in matters which are properly within his jurisdiction. The case of *Royal Aquarium, &c., Ltd. v. Parkinson* (p. 207 below) deals with the limits of absolute privilege in actions for slander, but there is no doubt that the

rule is much wider than there appears. It is clear that the malicious exercise of a discretion will render any person not a member of a court liable to an action at the suit of an injured party. He is not, however, liable for negligence or a mere error of judgment.¹

It is unfortunate that Dicey paid no attention to discretions, for it might fairly be said that they are the most important of all topics for the modern constitutional lawyer. In fact, the most difficult of constitutional problems arises from the growing tendency to confer on public authorities discretionary powers over persons and property. Many of the acts performed by public authorities or public officers are done in strict obedience to rules of statute or common law which impose on them a simple and definite duty in respect of which they have no choice. Such a duty is termed a ministerial duty. But for centuries it has been recognized that a government based upon ministerial duties alone would be too rigid for practical use. To some extent, at least, officers of government must be allowed a choice as to when, how, and whether they will act. Complete freedom of choice would, however, lead to the exercise of arbitrary power, and this, if it extends to interferences with persons and property, is a serious menace to the liberty of the subject. English law has, as usual, attempted to find a working compromise between the extremes of rigid legalism and unrestricted absolutism by treating administrative acts in respect of which freedom of choice, or, in the language of the law, discretion, is allowed as partaking in some measure of judicial characteristics. As Dr. W. A. Robson has said (*Justice and Administrative Law*, p. 229):

'The idea of a discretion which is to be exercised, not in a capricious and impetuous way, but in a disciplined and responsible manner, is a conception which has had a wide application in English law and politics. It really represents a compromise between the idea that people who possess power should be trusted with a free hand, and not tied down by narrow formulae, and the competing notion that some contingent control must be retained over them in case they act in an unreasonable way. Discretion in public affairs is seldom absolute; it is usually qualified. It must be used "judiciously", and hence we often hear the expression "a judicial discretion".'

The assimilation of administrative to judicial functions and the

¹ This applies even where the discretion is conferred not by the public but by agreement between private persons. Thus an arbitrator is in the same position as a quasi-judicial officer. There could be no stronger proof of the identity of public and private law in England.

development of the doctrine of discretions has been powerfully assisted by the practice, which is of immemorial antiquity in England, of entrusting the task of administration to bodies which were primarily courts of justice. In the Middle Ages manor court and county court alike managed the general business of the areas subjected to their jurisdiction. As these older local courts declined, their place was taken by the sessions of the Justices of the Peace, and these in their turn, partly by express statutory grant and partly by tacit assumption, came to exercise the same combination of judicial and administrative powers. Their predominance in county government, once established, remained almost unchallenged until the second quarter of the nineteenth century, and although it has since been gradually superseded, the principles on which they conducted local administration acquired a fixity which has enabled them to survive the transference of administrative functions to other bodies during the last hundred years, and to serve as a basis for the modern method of judicial control.

The eighteenth century may be regarded as the period in which this system existed in its most perfect form. County government was virtually monopolized by the Justices of the Peace and by ministerial officers controlled by them, such as constables and overseers. There was very little direct intervention by the central government in the work of local administration. If Parliament determined on a policy of interference with private rights it used for that purpose the agents already at its disposal, namely, the Justices of the Peace and their subordinates. It did not use them uniformly in the same way. It might in a given case be sufficient to impose on them a ministerial duty to perform some specified act, that is to say, a simple, definite duty, in respect of which nothing is left to discretion. In such a case the agent had nothing to do but obey. But Parliament might in other cases leave it to the discretion of its agents to decide whether they should act or not. The grant of licences for the sale of various commodities was left in this way to the discretion of the Justices of the Peace; many of the acts required of them in the administration of the Poor Law were to be done by them only if they thought fit.

Now although the administrative functions of the Justices of the Peace were clearly distinguishable from their judicial functions, they brought and were expected to bring the same qualities to bear in either case. Maitland, writing in 1888 of the County Justices,

just before their administrative duties were transferred to the County Councils, says:

'Hitherto all the business of granting licenses, and the like, has been transacted by men trained in judicial work, men seated on a bench, men holding sessions, men who on the same day would like enough have to try a vagabond or to consider whether there was sufficient reason for sending a prisoner to trial for murder. . . . Whatever the justice has had to do has soon become the exercise of a jurisdiction; whether he was refusing a license or sentencing a thief, this was an exercise of jurisdiction, an application of the law to a particular case. Even if a discretionary power was allowed him, it was none the less to be exercised with a "judicial discretion"; it was not expected of him that he should have any "policy"; rather it was expected of him that he should not have any "policy".' (*Collected Papers*, i. 478.)

Thus the absence of any 'separation of powers', either in theory or practice, tended to subject local administration to the rules applicable to courts of justice. No doubt this tendency would have been weaker, and administration might have become more a matter of 'policy', had the Justices of the Peace continued to be controlled in respect of their administrative functions by the Star Chamber: but after the abolition of that court they ceased to be agents carrying out a policy in obedience to the orders of the central executive, and became under a duty to obey the law alone. The exercise of their administrative functions, as of their judicial functions, passed under the supervision of the courts of common law, which used the same methods of control for both. It is not surprising that when administrative functions of a kind substantially similar to those exercised by the Justices of the Peace were conferred on bodies which were not in any sense courts of law, the common law courts should have exercised the same supervision and used the same methods (see *R. v. Electricity Commissioners*, p. 187 below).

The principal weapons used by the common law courts in controlling inferior courts are the Prerogative Writs. These writs, which are not original writs, but writs issued by a court, were at first granted only on the application of the Crown. By a curious historical development they have become available to the subject also, and in many cases even against the central executive itself. The most famous of the Prerogative Writs, Habeas Corpus, has indeed become the great safeguard of individual liberty against the encroachments of the government, and is now so far from giving

any procedural advantage to the Crown that whereas application for the writ may be made to one court after another until the prisoner is set at liberty, once a court has decided that the imprisonment is illegal, there is no appeal, even though the imprisonment be by order of the Crown itself (*Secretary of State for Home Affairs v. O'Brien*, p. 178 below).

The procedure followed in respect of the Prerogative Writs has changed considerably in the course of centuries and is not important for our present purpose. The process by which obedience to them is enforced is that of attachment for contempt of court, a term which includes any conduct which tends to create a disregard of the authority of the Court. The person attached is dealt with by the Court summarily and without the intervention of a jury, and may be fined and/or imprisoned until he purges his contempt by due submission to the authority of the Court.

The writs which are most often used in the control of administrative authorities are mandamus, prohibition, and certiorari.

Mandamus is used to enforce the performance of a ministerial duty. Thus it may be issued where any person has been injured by the failure of a ministerial officer to do his legal duty, but only if he has no other advantageous remedy open to him. It will not lie in respect of a purely judicial or quasi-judicial duty; but this only means that it cannot be employed to interfere with the actual exercise of a discretion. Judicial and quasi-judicial officers are under a ministerial duty to try a case or to use their discretion (see *Ferguson v. Earl of Kinnoul*, p. 185 below; a Scottish case, not decided on mandamus, but illuminating on the general principle of substantive law). They are also under a ministerial duty, once they have come to a decision, to carry it into effect. Their discretion is then, in the words of Farwell L.J., 'merged in a duty' (*Burr v. Smith*, [1909] 2 K. B. at p. 313; see also *Reg. v. Boteler*, p. 198 below). To enforce the performance of either of these ministerial duties, a mandamus will issue, just as though the officer were a ministerial, and not a judicial officer.

It must be noted that the writ cannot be used by a subject to compel a servant of the Crown to perform a duty which he owes to the Crown, though if a statutory duty be imposed on a servant of the Crown, he can be compelled by mandamus to perform it (see *Reg. v. Lords Commissioners of the Treasury*, (1872) L. R. 7 Q. B. 387; and see p. 225 below).

Prohibition is used for the purpose of preventing an inferior court from exceeding its jurisdiction. It is an order to the inferior court to cease from the hearing of a case on the ground of excess of jurisdiction. It has been extended to all bodies which have the duty to decide anything, whether they are or are not courts in the strict sense of the term, but it will not issue to a ministerial officer, or indeed to any authority which does not exercise judicial or quasi-judicial functions (*R. v. Electricity Commissioners*, p. 187 below ; see also *Clifford and O'Sullivan*, pp. 374, 398, below ; for an unsuccessful attempt to obtain prohibition against a legislative body, see *R. v. Legislative Committee of the Church Assembly, and Church Assembly, Ex parte Haynes Smith*, [1928] 1 K. B. 411).

Certiorari is a command to an inferior court to send up a record of all the proceedings taken before it in a given case, so that the Court issuing the writ may deal with it as may seem best. It is used for several purposes, such as to bring up a decision to be quashed for lack of jurisdiction or for fraud or for error on the face of it, or for the purpose of facilitating an appeal from a decision, or in order to remove a prosecution from one court to another where the accused can be more fairly tried. It will not issue to a ministerial officer, but has been, like prohibition, extended to quasi-judicial bodies which are not in any sense of the term courts. It differs from prohibition in being corrective rather than preventive in character.

While mandamus is somewhat sparingly granted, there is no reluctance to extend the application of prohibition or certiorari. Brett L.J. said in *R. v. Local Government Board*, (1886) 10 Q. B. D. at p. 821 :

‘My view of the power of prohibition at the present day is that the Court should not be chary of exercising it, and that wherever the Legislature entrusts to any body of persons other than to the superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament.’

The same is no doubt true of certiorari.

Around these writs has grown a body of substantive rules, elaborated for the purpose of controlling inferior courts, which, as extended to the exercise of discretionary powers by bodies which are not courts of justice, are the best substitutes England can show for the highly developed systems which, in continental countries,

regulate the relations between the private subject and the administration. In the aggregate, therefore, they indicate the behaviour which the common law requires from a court of justice, in the hearing of a case.

A judge is, in the first place, required to keep within his jurisdiction. If he does not, what he has done is liable to be set aside, and may expose him to proceedings at the instance of an aggrieved party (see p. 126 above). Moreover, he may only try the issue presented to him by the parties, and in so doing, he must not have regard to any extraneous considerations; indeed, if he does so, he will in effect be substituting another issue for the one submitted to him. He must not act as judge in any matter in which he has a pecuniary interest, though this objection may be waived by both the parties to the suit. He ought not to act if, without being interested in the matter, he is for any other reason biased in favour of one or other of them, but the disqualification here is not quite so strict (see *Reg. v. Rand*, p. 193 below). Both disqualifications are expressed in the maxim that a man shall not be judge in his own cause. Further, the hearing must be in public (see p. 127 above).

The remaining requirements have been summed up by Dr. W. A. Robson in the phrase, that every one is entitled to his 'day in court'. Every litigant, in other words, has a right to be confronted with his opponent in the presence of the judge. The judge must hear each party in turn, and must decide the case in person, without delegating any part of his duty to any other person. The right of every litigant to see his judge and put his case before him is expressed in the maxim 'audi alteram partem', and, as applied to criminal proceedings, in the more familiar English phrase, that a man should not be condemned unheard. It is also said to be demanded by 'natural justice'.

These requirements are obviously appropriate to the proceedings of courts of justice, and provide a very real safeguard to the litigant. It is not to be assumed that they are so appropriate to the exercise of discretionary powers by administrative bodies. Discretions of this kind, while analogous to the exercise of judicial functions, are at best only 'quasi-judicial'. The use of the prefix is a warning that a quasi-judicial process does not contain all the elements to be found in a judicial process. The consideration of powers exercised by way of quasi-judicial decision was one of the terms of reference of the Lord Chancellor's Committee on Ministers' Powers, which has

recently issued its report (1982, Cmd. 4060). The Committee was therefore bound to attempt a definition of the term. For their discussion of the topic, reference should be made to pp. 73-4 of their report. For the present purpose it is enough to take the conclusion they arrive at (p. 81), namely, that 'generally speaking a quasi-judicial decision is only an administrative decision, some stage or element of which possesses judicial characteristics'. The administrative element, which distinguishes it from a purely judicial decision, consists in the fact that, whereas it is of the essence of a judicial decision that the matter is finally disposed of by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law, and nothing remains to be done except the execution of the judgment, a step which the law of the land compels automatically, an officer making a quasi-judicial decision has, after ascertaining the facts and applying the law to them, to use his discretion whether he will or will not take administrative action and if so what action. In exercising his discretion he will of course be guided by considerations of public policy. The constitutional importance of quasi-judicial decisions is greatest where they involve an interference with the person or property of the individual. In such cases, which alone will be discussed in the following pages, it will generally be found that a public officer has committed to him a power to decide on a course of administrative action after weighing the conflicting claims of the public interest and of the private interest of some private person.

It follows that in quasi-judicial proceedings the maxim that a man shall not be judge in his own cause may be very difficult to apply. It is quite easy to insist that a public officer shall not exercise discretionary powers in a case where he has a pecuniary interest, or where he has already shown by his attitude to an application that he has a definite bias. Thus, in *Frome United Breweries Co. v. Bath Justices*, [1926] A. C. 586, the decision of the justices to refuse a licence was set aside on the ground that one of the persons taking part in the decision had previously opposed the application. But beyond this it is almost impossible to go; for in all cases of this kind the person deciding between the claims of the public and of the private individual is himself a public officer, and therefore a judge in his own case. Moreover, in contrast to the judge, who can do nothing until some one brings a dispute before him, a public officer

entrusted with quasi-judicial functions may regularly be empowered to take the initiative himself. In fact, he must be constantly on the watch, ready to act whenever, in his opinion, the public interest requires it. The more zealous administrator he is, the more likely he is to favour the public interest. The difficulty is inevitable, and no satisfactory solution has yet been suggested. The Committee on Ministers' Powers propose that in any case in which it appears probable that a Minister may be disqualified by an interest of this kind from discharging impartially the judicial functions involved in a quasi-judicial decision (i.e. in particular, the findings of facts and law), Parliament should entrust those functions to a Ministerial Tribunal that they may thus be discharged independently of the Minister as a condition precedent to his ultimate administrative decision. The safeguard suggested is not perfect, for it is not possible to isolate completely the administrative decision from what precedes it, and there is some danger in admitting that even in its final stages a proceeding which may affect the rights of the subject should be allowed to lack judicial characteristics. But if there is to be any administrative element at all in the decision, there must sooner or later come a stage at which an administrative officer becomes judge in his own cause.

Consequently, it is most important that an administrative officer, in arriving at a quasi-judicial decision, should not take extraneous considerations into account. But here again it is not altogether easy to apply to quasi-judicial decisions rules which were originally developed in connexion with purely judicial functions. The judge must try the issue presented to him by the parties, and nothing else. Moreover, since he delivers, or can be made to deliver, a reasoned judgment, it is usually easy to see if he has been influenced by extraneous circumstances, and thereby decided an issue which was not the one set before him. Now in many cases it is clear that an administrative authority has, in the exercise of a quasi-judicial discretion, paid attention to circumstances which were wholly extraneous to the issue it was empowered to decide. In such cases it has clearly exceeded its jurisdiction, and can be called to account for it, by a writ of prohibition or otherwise. If it was under a duty to exercise its discretion, it has also, by deciding the wrong issue, failed to decide the right one, and accordingly has failed to exercise its jurisdiction. For this it can be called to account, by means of a writ of mandamus, if no other convenient remedy is available. *Reg.*

v. *Boteler* (p. 198 below) is a simple case of this kind. An important special application of this rule is made where an administrative authority has taken extraneous considerations into account owing to a mistaken view of the law applicable to the case. It is a fundamental principle that, where a discretion is committed to any one, whether it is of a quasi-judicial character or not, he decides without appeal to the ordinary courts. They cannot substitute their discretion for his. *Smith v. Chorley District Council*, [1897] 1 Q. B. 582. This is, generally speaking, as true of questions of law as of questions of fact. Sometimes, however, an administrative authority may, by taking a wrong view of the law, mistake the exact nature of the issue presented for its decision; and in that event, a person injured by its decision can invoke the assistance of the ordinary courts. Thus, in *R. v. Board of Education*, [1910] 2 K. B. 165 (affirmed by the House of Lords, under the name of *Board of Education v. Rice*, [1911] A. C. 179) the Board of Education had been entrusted by Parliament with the task of deciding, as between a local education authority and the managers of a non-provided school, whether the former had maintained the school in an efficient condition. They decided that it had, although it was clear that it was not efficient if judged in accordance with the standard of efficiency required from a provided school. It was held by the courts that the law imposed an identical standard of efficiency for both types of school, and that, by differentiating between them, the Board had taken a wrong view of the law; further, that by so doing, they had substituted for the issue they had to try another issue in respect of which they had no jurisdiction. Farwell L.J. said in the Court of Appeal ([1910] 2 K. B. at p. 179),

'If the tribunal has exercised the discretion entrusted to it bona fide, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the Courts cannot interfere; they are not a Court of Appeal from the tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which cases the Courts have regarded them as declining jurisdiction.' (See also *Reg. v. Boteler*, p. 198 below.)

The Courts are therefore prepared to check what is called in the terminology of the French administrative courts *détournement de*

pouvoir, that is to say, the use of a discretion by a public authority for purposes other than that for which it has been conferred. This is a most salutary principle, to the possibilities of which it is difficult to see any limit, except where the authority at fault is so shameless as to give a deliberately false account of its motives; it has been applied elsewhere, apart from the Prerogative Writs. Thus Lord Cranworth said in *Galloway v. Mayor and Commonalty of London*, (1866) L. R. 1 H. L. at p. 43,

* 'When persons embarking in great undertakings, for the accomplishment of which those engaged in them have received authority from the Legislature to take compulsorily the lands of others, making to the latter proper compensation, the persons so authorized cannot be allowed to exercise the powers conferred on them for any collateral object; that is, for any purposes except those for which the Legislature has invested them with extraordinary powers. . . . It has become a well-settled head of equity, that any company authorized by the Legislature to take compulsorily the land of another for a definite object, will, if attempting to take it for any other object, be restrained by the injunction of the Court of Chancery from so doing.'

The application of this principle has even been extended to check the payment of abnormally high wages to employees of a borough council (see the Poplar cases, and especially *Roberts v. Hopwood*, [1925] A. C. 578).

The value of the principle is, however, somewhat diminished by the absence of any general obligation on administrative authorities to give reasons for their decisions. Even where the issue presented to them is narrow and well defined, it is not always made obvious whether extraneous considerations have been taken into account. Where, as is often the case, an administrative authority is given a wide field of discretion, it is to some extent enabled itself to choose the issue to be decided, and to that extent to determine what considerations are appropriate to its decision. The limits of the discretion may be so widely drawn that hardly any considerations could be held to be extraneous. For Parliament has long given up its exclusive claim to determine policy. The new local authorities, unlike the justices of the peace (see p. 132 above), are expected to have a policy, and their members defend their policy at the local elections. Central Departments also have in some degree the power of framing a policy, apart from or in amplification of that expressed by Parliament in statutory form. When we speak of an authority taking into

account circumstances extraneous to a given issue, we usually mean that it has not attempted sincerely to carry into effect the policy inherent in the statute which has entrusted to it the power to decide, but has attempted to carry out some unauthorized policy of its own. But if it is clear from the terms of the statute that the authority has power to act according to its own views of policy, it is almost impossible to attack its decisions on this ground.

The Committee on Ministers' Powers recommend (p. 100) that any party affected by a decision should be informed of the reasons on which the decision is based. This should obviously be done; it would dispel any suspicion of arbitrariness or bad faith in the exercise of quasi-judicial functions. It would also, where an administrative authority has power to determine its own policy, ensure that its policy should be made clear to the public, and would thus compensate for the weakened operation in such cases of the rule against extraneous considerations. Moreover, the policy might tend to become more regular, though there should be no difficulty in changing it from time to time. There is no need to fear any rigidity.

It is perhaps in respect of procedure that quasi-judicial proceedings differ most from the exercise of purely judicial functions. While insisting that administrative authorities shall decide questions in a judicial spirit, the Courts have not compelled them to allow every one his day in Court. The whole subject was discussed most fully in *L. G. B. v. Arlidge* (p. 199 below), the most famous of all cases on the exercise of jurisdiction by administrative bodies.

The Courts have firmly insisted that the substance of the maxim *audi alteram partem* shall always be observed. In *Cooper v. Wandsworth Board of Works* (p. 194 below) it was applied to a proceeding which appears at first sight to have been not even quasi-judicial in character, much less judicial. There could be no clearer example of the tendency of the Courts to treat any discretionary power to interfere with the private rights of the subject as a species of jurisdiction, to be exercised as such. But the House of Lords held that so long as the Local Government Board observed the statutory requirements, they were not bound to adopt the procedure of a court of justice, but were at liberty to adopt that procedure which was most convenient, and was hallowed by previous usage. This was tantamount to saying that the maxim *audi alteram partem* need not be literally obeyed; and, since in a government department the work of deciding questions is not usually concentrated in the hands

of one person, the respondent failed to make good his claim to see, or even to individualize his judge. If the Board had refused to allow him to put forward his case, its decision could not have stood, but there was no suggestion that they had been guilty of any default in this respect. There was more substance in the respondent's claim to see the report which the inspector had submitted to the Board after holding the public local inquiry. This was a part of the proceedings which could easily be detached from the rest, and inasmuch as the inspector did not decide anything finally, the respondent claimed to treat his report as being, as it were, a case made out against himself, which he ought to have an opportunity of answering before a final decision was arrived at by the Board. Here again he failed.

This case has come in for a great deal of criticism, though it is not easy to see how the House of Lords could have decided otherwise, unless they had laid themselves open to the charge that they had legislated rather than come to a decision on the existing law. However, there will be general satisfaction with the recommendation of the Committee on Ministers' Powers (pp. 100-7, 116-17), that inspectors' reports should be published. If these reports are published, and the reasons for the final decision of the administrative authority also are made known to the person affected, there would seem to be no need for further alteration. If he is allowed to know the case he has to meet, to put forward his own case, and to know the reasons for any decision against him, it is surely unnecessary to inquire further into the identity of the person or persons deciding, or the process they have followed.

Apart from statute, there is clearly no obligation to afford a public hearing in administrative matters. Even a court of justice can sit *in camera* when it is exercising such administrative functions as appointing guardians or trustees (*Scott v. Scott*, [1918] A. C. at p. 437). It has indeed been decided in a recent case (*Hearts of Oak Assurance Company, Ltd. v. A.-G.*, (1982) 48 T. L. R. 296), that a subordinate administrative officer holding an inquiry for the purpose of collecting information which might be made the basis of a decision by his superior, had no power to hold that inquiry in public.

Thus although the rules applied by the Courts to the control of judicial bodies have suffered some attenuation in their extension to administrative authorities exercising quasi-judicial functions, the latter can be prevented from exceeding the jurisdiction conferred

on them, and from abusing their powers in certain fairly obvious ways. But there is no appeal to the Courts from the actual decision they have arrived at in the exercise of their discretion. The Committee on Ministers' Powers are frankly opposed to the introduction of any such appeal. It would be an appeal to an irresponsible Court from the decision of a body responsible to the House of Commons or to a local electorate, to which, moreover, Parliament has entrusted the discretion. The Courts themselves are not over-anxious to assume appellate functions in this regard, for, as Lord Sumner said in *Roberts v. Hopwood*, [1925] A. C. at p. 606,

'There are many matters, which the Courts are indisposed to question. Though they are the ultimate judges of what is lawful and what is unlawful to borough councils, they often accept the decisions of the local authority simply because they are themselves ill equipped to weigh the merits of one solution of a practical question as against another.'

They also think that as a general rule there should be no appeal on points of fact. They do, however, recommend that there should be an absolute and universal right of appeal to a single judge of the High Court on any question of law, and that the present cumbrous and expensive procedure of the prerogative writs should be made simpler and more expeditious, and recourse to the Courts on account of excess of jurisdiction assimilated to appeal and, where convenient, combined with it in the same proceeding (pp. 108-9, 117). These, it may be submitted with respect, are very valuable recommendations. It is most essential that the ordinary Courts should exercise a strict supervision in matters of law, and above all that there should be a cheap and speedy method of restraining administrative authorities from exceeding their jurisdiction. Unfortunately there has occasionally been a tendency to oust the jurisdiction of the Courts entirely in such matters. Certain statutes give a Minister power to decide conclusively and in the last resort questions of a quasi-judicial character. There can be no objection to such a provision if it merely implies that the minister's discretion is, so long as he keeps within the limits which the law allows, absolute. But it is in most cases quite clear, and the Courts have interpreted it to mean, that their jurisdiction is entirely ousted. A reference to the case of *Ex parte Ringer*, (1909) 25 T. L. R. 718, will indicate the possible effects of such legislation. There a divisional court had to interpret s. 89 (8) of the Small Holdings and Allotments Act, 1908

(8 Edw. 7, c. 96). They held that their jurisdiction was completely ousted. The section ran as follows:

'An order [of the local authority] under this section shall be of no force unless and until it is confirmed by the Board [of Agriculture], and the Board may, subject to the provisions of the first schedule to this Act, confirm the order either without modification or subject to such modifications as they think fit, and an order when so confirmed shall become final and have effect as if enacted in this Act, and the confirmation by the Board shall be conclusive evidence that the requirements of this Act have been complied with, and that the order has been duly made and is within the powers of this Act.'

Such a section was a standing invitation to the Board to exceed its powers. The student who refers to Dr. C. K. Allen's *Law in the Making*, at pp. 342-4, will learn of the existence of opportunities of *détournement de pouvoir* of which the Ministry of Health has not been slow to avail itself.

While it is obviously incompetent for the ordinary Courts to review a quasi-judicial decision on the merits, or even to hear appeals on fact, it is not obvious that all administrative authorities should decide without appeal. In one way or another, many decisions made by local authorities are subject to the control of the central departments or other public authorities. *L. G. B. v. Arlidge* (p. 199 below) arose out of an appeal from a metropolitan borough council to the Local Government Board. The whole system of district audit (see W. I. Jennings, *Principles of Local Government Law*, pp. 175-81) serves as a check on the financial irregularities and excesses of certain local bodies. Occasionally the control is not by way of appeal, but takes the form of a requirement that a scheme formulated by a local authority shall only come into force if and when it has been approved by the Ministry of Health or other government department (see *R. v. Minister of Health, Ex parte Yaffe*, pp. 12-18 above). In fact, most of the work of the government departments connected with internal administration is of a supervisory, and therefore to some extent of an appellate character. Their own decisions, even where they are of first instance, are not normally subject to appeal. The Committee on Ministers' Powers, while rejecting impartially the opposite suggestions that there should be an appeal from the decision to a court of law and that the present system should be replaced by another comparable to the *Droit Administratif* at work in France, recommend that very

exceptionally an appeal might lie from a Minister or Ministerial Tribunal to a specially constituted Appeal Tribunal (p. 108).

Judicial functions, in the strict sense of the term, are rarely committed to administrative authorities. The Committee on Ministers' Powers recommend that their assignment to a Minister or Ministerial Tribunal should be regarded as exceptional and requiring justification in each case. At all events, they should be assigned, wherever possible, to a tribunal appointed by the Minister rather than by the Minister himself, and in every instance the utmost care should be taken to avoid the exercise of judicial functions by any person who has a ministerial 'interest' (p. 116).

Whatever definition may be given to the term quasi-judicial decision, it is evident that there must be occasions when an administrative officer is given power to decide at his absolute discretion, without the intervention of any judicial stage or element. In respect of these administrative decisions, as the Committee on Ministers' Powers term them, the control of the Courts is limited to ensuring that the officer does not overstep his powers. It must always be a matter of construction of the empowering statute whether a decision is of this class, but it may be suggested that the Courts will be reluctant to hold that the judicial element can ever be wholly absent where the private rights of a subject are at stake. On the other hand, aliens are not always treated with such respect. No doubt a resident alien friend is entitled to as much protection as a subject so far as his property is concerned (see pp. 314-15 below). But though he may become naturalized, he has no right to naturalization, and the grant of a certificate is in the absolute discretion of the Secretary of State, who need not give any reasons for a refusal or even profess to act in a judicial manner. Likewise, no alien has a right to enter the country (p. 314 below), or to remain here longer than the Crown may permit. Thus, where, in *Ex parte Venicoff*, [1920] 3 K. B. 72, writs of certiorari and habeas corpus were applied for on behalf of an alien who was held in detention prior to being deported by order of the Secretary of State, it was held that the latter was not a judicial officer for this purpose, but an executive officer bound to act for the public good, and that it was left to his judgment whether upon the facts before him it was desirable that he should make a deportation order (at p. 80). He was therefore under no obligation to give the deportee a hearing. But this case cannot be a precedent where the rights of a British subject are at stake.

CASES

INTICK v. CARRINGTON, (1765) 19 St. Tr. 1030

COURT OF COMMON PLEAS

[This was an action of trespass for breaking and entering the plaintiff's house and seizing his papers. The defendants (who were King's Messengers) pleaded a warrant of the Secretary of State which ordered them to search for the plaintiff and bring him together with his books and papers in safe custody before the Secretary of State to be examined. The jury found a special verdict and assessed the damages (if any) at £300.]

After argument on the points of law involved, and after time taken to consider,]

LORD CAMDEN C.J. delivered the judgment of the Court for the plaintiff, in the following words:

This record hath set up two defences to the action, on both of which the defendants have relied.

The first arises from the facts disclosed in the special verdict; whereby the defendants put their case upon the statute of 24 Geo. 2, insisting, that they have nothing to do with the legality of the warrants, but that they ought to have been acquitted as officers within the meaning of that act.

The second defence stands upon the legality of the warrants; for this being a justification at common law, the officer is answerable if the magistrate has no jurisdiction.

[His Lordship disposed of the first defence and continued:]

I come in my last place to the point, which is made by the justification; for the defendants, having failed in the attempt made to protect themselves by the stat. 24th of Geo. 2, are under a necessity to maintain the legality of the warrants, under which they have acted, and to shew that the Secretary of State, in the instance now before us, had a jurisdiction to seize the defendants' papers. If he had no such jurisdiction, the law is clear, that the officers are as much responsible for the trespass as their superior. . . .

This power, so claimed by the Secretary of State, is not supported by one single citation from any law book extant. It is claimed by no other magistrate in this kingdom but himself. . . .

The arguments, which the defendants' counsel have thought fit to urge in support of this practice, are of this kind.

That such warrants have issued frequently since the Revolution, . . .

That the case of the warrants bears a resemblance to the case of search for stolen goods.

They say too, that they have been executed without resistance upon many printers, booksellers, and authors, who have quietly submitted to the authority; that no action hath hitherto been brought to try the right; and that although they have been often read upon the returns of Habeas Corpus, yet no court of justice has ever declared them illegal.

And it is further insisted, that this power is essential to government, and the only means of quieting clamours and sedition. . . .

Before I state the question, it will be necessary to describe the power claimed by this warrant in its full extent. If honestly exerted, it is a power to seize that man's papers, who is charged upon oath to be the author or publisher of a seditious libel; if oppressively, it acts against every man, who is so described in the warrant, though he be innocent. It is executed against the party, before he is heard or even summoned; and the information, as well as the informers, is unknown. It is executed by messengers with or without a constable (for it can never be pretended, that such is necessary in point of law) in the presence or the absence of the party, as the messengers shall think fit, and without a witness to testify what passes at the time of the transaction; so that when the papers are gone, as the only witnesses are the trespassers, the party injured is left without proof. If this injury falls upon an innocent person, he is as destitute of remedy as the guilty: and the whole transaction is so guarded against discovery, that if the officer should be disposed to carry off a bank-bill, he may do it with impunity, since there is no man capable of proving either the taker or the thing taken. It must not be here forgot that no subject whatsoever is privileged from this search; because both Houses of Parliament have resolved, that there is no privilege in the case of a seditious libel.

Nor is there pretence to say, that the word 'papers' here mentioned ought in point of law to be restrained to the libellous papers only. The word is general, and there is nothing in the warrant to confine it; nay, I am able to affirm, that it has been upon a late

occasion executed in its utmost latitude: for in the case of *Wilkes v. Wood*, when the messengers hesitated about taking all the manuscripts, and sent to the Secretary of State for more express orders for that purpose, the answer was, 'that all must be taken, manuscripts and all.' Accordingly, all was taken, and Mr. Wilkes's private pocket-book filled up the mouth of the sack. I was likewise told in the same cause by one of the most experienced messengers, that he held himself bound by his oath to pay an implicit obedience to the commands of the Secretary of State; that in common cases he was contented to seize the printed impressions of the papers mentioned in the warrant; but when he received directions to search further, or to make a more general seizure, his rule was to sweep all. The practice has been correspondent to the warrant.

Such is the power, and therefore one should naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant.

If it is law, it will be found in our books. If it is not to be found there, it is not law.

The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law, are various. Distresses, executions, forfeitures, taxes, &c. are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good.

By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and see if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.

According to this reasoning, it is now incumbent upon the defendants to shew the law, by which this seizure is warranted. If that cannot be done, it is a trespass.

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society.

But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods.

I answer, that the difference is apparent. In the one, I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon's conviction shall intitle me to restitution. In the other, the party's own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is cleared by acquittal.

The case of searching for stolen goods crept into the law by imperceptible practice. It is the only case of the kind that is to be met with. No less a person than my Lord Coke (4 Inst. 176) denied its legality and therefore if the two cases resembled each other more than they do, we have no right, without an Act of Parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity.

Observe too the caution with which the law proceeds in this singular case.—There must be a full charge upon oath of a theft committed.—The owner must swear that the goods are lodged in such a place.—He must attend at the execution of the warrant to shew them to the officer, who must see that they answer the description.—And, lastly, the owner must abide the event at his peril: for if the goods are not found, he is a trespasser; and the officer being an innocent person, will be always a ready and convenient witness against him (see Hawk. P.C., ed. by Leach, Bk. 2, chap. 18, s. 17).

On the contrary, in the case before us nothing is described, nor distinguished: no charge is requisite to prove, that the party has any criminal papers in his custody: no person present to separate or select: no person to prove in the owner's behalf the officer's misbehaviour.—To say the truth, he cannot easily misbehave, unless he pilfers; for he cannot take more than all.

If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject, by adding proper checks; would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy: my answer is, that all these precautions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing.

What would the Parliament say, if the judges should take upon themselves to mould an unlawful power into a convenient authority, by new restrictions? That would be, not judgment, but legislation.

I come now to the practice since the Revolution, which has been strongly urged, with this emphatical addition; that an usage tolerated from the æra of liberty, and continued downwards to this time through the best ages of the constitution, must necessarily have a legal commencement. Now, though that pretence can have no place in the question made by this plea, because no such practice is there alleged; yet I will permit the defendant for the present to borrow a fact from the special verdict, for the sake of giving it an answer.

If the practice began then, it began too late to be law now. If it was more ancient, the Revolution is not to answer for it; and I could have wished, that upon this occasion the Revolution had not been considered as the only basis of our liberty. . . .

With respect to the practice itself, if it goes no higher, every lawyer will tell you, it is much too modern to be evidence of the common law; and if it should be added, that these warrants ought to acquire some strength by the silence of those Courts, which have heard them read so often upon returns without censure or animadversion, I am able to borrow my answer to that pretence from the Court of King's Bench, which lately declared with great unanimity in the *Case of General Warrants*, that as no objection

was taken to them upon the returns, and the matter passed *sub silentio*, the precedents were of no weight. I most heartily concur in that opinion; and the reason is more pertinent here, because the Court had no authority in the present case to determine against the seizure of papers, which was not before them; whereas in the other they might, if they had thought fit, have declared the warrant void, and discharged the prisoner *ex officio*.

This is the first instance I have met with, where the ancient immemorable law of the land, in a public matter, was attempted to be proved by the practice of a private office. The names and rights of public magistrates, their power and forms of proceeding as they are settled by law, have been long since written, and are to be found in books and records. Private customs indeed are still to be sought from private tradition. But who ever conceived a notion, that any part of the public law could be buried in the obscure practice of a particular person?

To search, seize, and carry away all the papers of the subject upon the first warrant: that such a right should have existed from the time whereof the memory of man runneth not to the contrary, and never yet have found a place in any book of law; is incredible. But if so strange a thing could be supposed, I do not see, how we could declare the law upon such evidence.

But still it is insisted, that there has been a general submission, and no action brought to try the right.

I answer, there has been a submission of guilt and poverty to power and the terror of punishment. But it would be strange doctrine to assert that all the people of this land are bound to acknowledge that to be universal law, which a few criminal book-sellers have been afraid to dispute.

The defendants upon this occasion have stopped short at the Revolution. But I think it would be material to go further back, in order to see, how far the search and seizure of papers have been countenanced in the antecedent reigns.

First, I find no trace of such a warrant as the present before that period, except a very few that were produced the other day in the reign of king Charles 2.

But there did exist a search-warrant, which took its rise from a decree of the Star-Chamber. . . .

It was very evident, that the Star-Chamber, how soon after the invention of printing I know not, took to itself the jurisdiction

over public libels, which soon grew to be the peculiar business of that court. . . .

The Star-Chamber from this jurisdiction presently usurped a general superintendence over the press, and exercised a legislative power in all matters relating to the subject. They appointed licensers; they prohibited books; they inflicted penalties; and they dignified one of their officers with the name of the messenger of the press, and among other things enacted this warrant of search.

After that court was abolished, the press became free, but enjoyed its liberty not above two or three years; for the Long Parliament thought fit to restrain it again by ordinance. . . . This parliament, therefore, did by ordinance restore the Star-Chamber practice; they recalled the licences, and sent forth again the messenger. . . . Upon the Restoration, the press was free once more, till the 18th and 14th of Charles 2, when the Licensing Act passed, which for the first time gave the Secretary of State a power to issue search warrants; but these warrants were neither so oppressive, nor so inconvenient as the present. The right to enquire into the licence was the pretence of making the searches; and if during the search any suspected libels were found, they and they only could be seized.

This Act expired the 32nd year of that reign, or thereabouts. It was revived again in the 1st year of king James 2, and remained in force till the 5th of king William, after one of his parliaments had continued it for a year beyond its expiration.

I do very much suspect, that the present warrant took its rise from these search-warrants, that I have been describing; nothing being easier to account for than this engraftment; the difference between them being no more than this, that the apprehension of the person in the first was to follow the seizure of papers, but the seizure of papers in the latter was to follow the apprehension of the person. The same evidence would serve equally for both purposes. If it was charged for printing or publishing, that was sufficient for either of the warrants. Only this material difference must always be observed between them, that the search warrant only carried off the criminal papers, whereas this seizes all.

When the Licensing Act expired at the close of king Charles 2's reign, the twelve judges were assembled at the king's command, to discover whether the press might not be as effectually restrained by the common law, as it had been by that statute.

I cannot help observing in this place, that if the Secretary of State was still invested with a power of issuing this warrant, there was no occasion for the application to the judges: for though he could not issue the general search-warrant, yet upon the least rumour of a libel he might have done more, and seized everything. But that was not thought of, and therefore the judges met and resolved:

First, that it was criminal at common law, not only to write public seditious papers and false news; but likewise to publish any news without a licence from the king, though it was true and innocent.

Secondly, that libels were seizable (see 7 St. Tr. 929). . . .

These are the opinions of all the twelve judges of England; a great and reverend authority.

Can the twelve judges extrajudicially make a thing law to bind the kingdom by a declaration, that such is their opinion?—I say, No.—It is a matter of impeachment for any judge to affirm it. There must be an antecedent principle or authority, from whence this opinion may be fairly collected; otherwise the opinion is null, and nothing but ignorance can excuse the judge that subscribed it. Out of this doctrine sprang the famous general search-warrant, that was condemned by the House of Commons; and it was not unreasonable to suppose, that the form of it was settled by the twelve judges that subscribed the opinion.

The deduction from the opinion to the warrant is obvious. If you can seize a libel, you may search for it: if search is legal, a warrant to authorize that search is likewise legal: if any magistrate can issue such a warrant, the Chief Justice of the King's Bench may clearly do it. . . .

I can find no other authority to justify the seizure of a libel, than that of Scroggs and his brethren.

If the power of search is to follow the right of seizure, every body sees the consequence. He that has it or has had it in his custody; he that has published, copied, or maliciously reported it, may fairly be under a reasonable suspicion of having the thing in his custody, and consequently become the object of the search-warrant. If libels may be seized, it ought to be laid down with precision, when, where, upon what charge, against whom, by what magistrate, and in what stage of the prosecution. All these particulars must be explained and proved to be law, before this general proposition can be established.

As therefore no authority in our books can be produced to support such a doctrine, and so many Star-Chamber decrees, ordinances, and Acts have been thought necessary to establish a power of search, I cannot be persuaded, that such a power can be justified by the common law.

I have now done with the argument, which has endeavoured to support this warrant by the practice since the Revolution.

It is then said, that it is necessary for the ends of government to lodge such a power with a state officer; and that it is better to prevent the publication before than to punish the offender afterwards. I answer, if the legislature be of that opinion, they will revive the Licensing Act. But if they have not done that, I conceive they are not of that opinion. And with respect to the argument of State necessity, or a distinction that has been aimed at between State offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions.

Serjeant Ashley was committed to the Tower in the 3rd of Charles 1st, by the House of Lords only for asserting in argument, that there was a 'law of State' different from the common law; and the Ship-Money judges were impeached for holding, first, that State-necessity would justify the raising money without consent of parliament; and secondly, that the king was judge of that necessity.

If the king himself has no power to declare when the law ought to be violated for reason of State, I am sure we his judges have no such prerogative.

Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shewn, where the law forceth evidence out of the owner's custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action.

In the criminal law such a proceeding was never heard of; and yet there are some crimes, such for instance as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction. . . .

If, however, a right of search for the sake of discovering evidence ought in any case to be allowed, this crime above all others ought to be excepted, as wanting such a discovery less than any other. It is committed in open day-light, and in the face of the world; every act of publication makes new proof; and the solicitor of the treasury, if he pleases, may be the witness himself. . . .

I have now taken notice of everything that has been urged upon the present point; and upon the whole we are all of opinion, that the warrant to seize and carry away the party's papers in the case of a seditious libel, is illegal and void.

Extract from

MANAGERS OF THE METROPOLITAN ASYLUM DISTRICT *v.* HILL,
(1881) 6 App. Cas. at p. 211

HOUSE OF LORDS

LORD WATSON.—The judgment of this House in *The Hammer-smith Railway Company v. Brand*, (1869) L. R. 4 H. L. 171, determines that where Parliament has given express powers to construct certain buildings or works according to plans and specifications, upon a particular site, and for a specific purpose, the use of these works or buildings, in the manner contemplated and sanctioned by the Act, cannot, except in so far as negligent, be restrained by injunction, although such use may constitute a nuisance at common law; and that no compensation is due in respect of injury to private rights, unless the Act provides for such compensation being made. Accordingly the Respondents did not dispute that if the Appellants or the Local Government Board had been, by the *Metropolitan Poor Act*, 1867, expressly empowered to build the identical hospital which they have erected at *Hampstead*, upon the very site which it now occupies, and that with a view to its being used for the treatment of patients suffering from small-pox, the Respondents would not be entitled to the judgment which they have obtained. The Appellants do not assert that express power or authority to that effect has been given by the Act either to themselves or to the Board; but they contend that, having regard to the nature of the public duties laid upon them, and the necessities of the case, it must, on a fair construction of the Act, be held that the Legislature did intend them to exercise, and authorize

them to exercise, such power and authority under the direction and control of the Poor Law Board.

I see no reason to doubt that, wherever it can be shewn to be matter of plain and necessary implication from the language of a statute, that the Legislature did intend to confer the specific powers above referred to, the result in law will be precisely the same as if these powers had been given in express terms. And I am disposed to hold that if the Legislature, without specifying either plan or site, were to prescribe by statute that a public body shall, within certain defined limits, provide hospital accommodation for a class or classes of persons labouring under infectious disease, no injunction could issue against the use of an hospital established in pursuance of the Act, provided that it were either apparent or proved to the satisfaction of the Court that the directions of the Act could not be complied with at all, without creating a nuisance. In that case, the necessary result of that which they have directed to be done must presumably have been in the view of the Legislature at the time when the Act was passed.

On the other hand, I do not think that the Legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorized a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. In the latter case the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the Legislature, lies upon the persons seeking to justify the nuisance. Their justification depends upon their making good these two propositions—in the first place, that such are the imperative orders of the Legislature; and in the second place, that they cannot possibly obey those orders without infringing private rights. If the order of the Legislature can be implemented without nuisance, they cannot, in my opinion, plead the protection of the statute; and, on the other hand, it is insufficient for their protection that what is contemplated by the statute cannot be done without nuisance, unless they are also able to shew that the Legislature has directed it to be done. Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the

persons empowered to determine whether the general powers committed to them shall be put into execution or not, I think the fair inference is that the Legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for the purpose. . . .

The clauses in question belong to a class of enactments of which abundant examples are to be found in the statute book, the main object of which is to legalise the application of public rates to purposes which would otherwise be *ultra vires* of the bodies by whom these rates are administered. Such purposes are in themselves lawful; but it is not lawful to expend the money of the rate-payers without the express sanction of Parliament. And it appears to me that, in making provision with regard to asylums in the Metropolis, the Legislature has done nothing more than is requisite to place the authorities to whom it has committed the execution of that part of the Act, upon the same level as individuals in so far as the rights of third parties are concerned, but with the right, which individuals have not, to defray the costs by rates levied from the public.

'THE MERSEY DOCKS AND HARBOUR BOARD' TRUSTEES *v.* GIBBS;
THE SAME *v.* PENHALLOW, (1866) L. R. 1 H. L. 93

HOUSE OF LORDS

The following facts are taken from the speech of Lord Cranworth, L.C.:—

. . . Both cases arise out of one transaction. A ship called the *Sierra Nevada*, in entering, or endeavouring to enter, one of the docks, sustained injury by reason of a bank of mud left negligently at its entrance. The ship and the cargo were damaged. Two actions were brought against the Appellants, one by Gibbs, as owner of the cargo, the other by Penhallow, as owner of the ship. I do not think it necessary to go through the pleadings. In both cases the Exchequer Chamber held that the Appellants were liable. In both cases they have appealed, and the ground of appeal is, that they are not a company deriving benefit, like a railway company, from the traffic, but a public body of trustees, constituted by the Legislature for the purpose of maintaining the docks, and for that purpose having authority to collect tolls, to be applied in the

maintenance and repair of the docks, then in paying off a large debt, and ultimately in reducing the tolls for the benefit of the public. . . .

The Lord Chancellor moved that the following questions should be put to the Judges: In *The Mersey Trustees v. Gibbs*, 'Does the declaration in this case state a good cause of action?' In *The Mersey Trustees v. Penhallow*, 'Is the judgment of the Court of Exchequer Chamber right?'

The distinction between the two cases is immaterial.

BLACKBURN J.—My Lords, I have the honour, in answer to your Lordships' questions in these cases, to deliver the joint opinion of all the Judges who heard the argument [*after disposing of certain points of procedure, he continued:*]

The Court of Exchequer Chamber based the judgment in each of the cases on that of the Court of Exchequer Chamber in *The Lancaster Canal Company v. Parnaby*, (1839) 11 A. & E. 223. In that case the Defendants were a Company incorporated by Act of Parliament for the purpose of making and maintaining a canal, to be open for the use of the public on payment of rates, which the Defendants were empowered to receive for their own proper use and behoof (i.e., to be divided amongst the shareholders). And the Court of Exchequer Chamber, in that case, stated the law thus (*Id.* 242): 'The facts stated in the inducement show that the company made the canal *for their profit*, and opened it to the public upon payment of tolls to the company; and the common law, in such a case, imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate it without danger to their lives or property.'

In the present cases the trustees do not receive the dock rates for their own use and behoof, i.e., to be divided amongst themselves or their shareholders; but they are bound by the statutes, under which they are incorporated, to apply them to the purposes of the Acts, which may in substance be stated to maintain the docks and pay the very large debt contracted in making them.

The Court of Exchequer Chamber, in both cases, decided that this difference did not affect the question; that so long as the dock was kept open for the public, the duty to take reasonable care that the dock and its entrance were in such a state that those who

navigate it may do so without danger, was equally cast on the persons having the receipt of the tolls and the possession and management of the dock, whether the tolls were received for a beneficial or a fiduciary purpose.

If this proposition is correct, the direction of the Lord Chief Baron excepted to was right, for a body corporate never can either take care or neglect to take care, except through its servants; and (assuming it was the duty of these trustees to take reasonable care that the dock was in a fit state), it seems clear that if they, by their servants, had the means of knowing that the dock was in an unfit state, and were negligently ignorant of its state, they did neglect this duty, and did not take reasonable care that it was fit. And after hearing the very able arguments at your Lordships' bar, we are of opinion that the judgment of the Court of Exchequer Chamber was correct.

It is pointed out by Lord Campbell in *The Southampton and Itchin Bridge v. The Southampton Local Board*, (1858) 8 E. & B. 801, 812, that in every case the liability of a body created by statute must be determined upon a true interpretation of the statutes under which it is created. It is desirable, therefore, in the first place, to state what was the effect of the legislation, so far as it applied to these docks, at the time of the accident of the 12th of April, 1855. [*The learned judge discussed the statutes relating to the Mersey docks.*]

There are some peculiar enactments in one of the statutes (6 Geo. 4, c. 187, ss. 180 to 186), which were relied upon as shewing the intention of the Legislature, on which we shall remark afterwards; but, with this exception, there is nothing in the statutes either extending or limiting the liability of the dock trustees to those paying for the use of the docks, so as to make it different from that which the general law would cast upon them under such circumstances. And, consequently, in our opinion the great question in both these actions is, what is the duty which the general law does cast upon corporate trustees, being the proprietors of docks maintained under such enactments.

Now, it is obvious that a shipowner who pays dock rates for the use of the dock, or the owner of goods who pays warehouse rates for the use of a warehouse and the services of the warehousemen, is, as far as he is concerned, exactly in the same position, however the rates may be appropriated. He pays the rates for the dock

accommodation, or for warehouse accommodation and services, and he is entitled to expect that reasonable care should be taken that he shall not be exposed to danger in using the accommodation for which he has paid.

It is well observed by Mr. Justice Mellor, in *Coe v. Wise*, (1864) 5 B. & S. 440; 4 New Rep. 354, of corporations like the present, formed for trading and other profitable purposes, that though such corporations may act without reward to themselves, yet in their very nature they are substitutions on a large scale for individual enterprise. And we think that in the absence of anything in the statutes (which create such corporations) showing a contrary intention in the Legislature, the true rule of construction is, that the Legislature intended that the liability of corporations thus substituted for individuals should, to the extent of their corporate funds, be co-extensive with that imposed by the general law on the owners of similar works. If, indeed, the Legislature has, by express enactment or necessary intendment, enacted that they shall not be subject to such a liability, there is an end of the question; and if the Legislature had, in the Acts now under consideration, enacted that none of the revenue of the trustees of the Liverpool Docks should be applied to the purpose of discharging liabilities incurred in consequence of the trustees acting as proprietors of docks and warehouses, it would go far to shew that the Legislature intended that they should not be so liable. But the appropriation clause in the Acts now under consideration has no such effect. It was, indeed, supposed by the Court of King's Bench in *Rex v. Liverpool*, (1827) 7 B. & C. 61, that its effect was to prohibit the payment of poor rates; but your Lordships' House has decided, in the recent case of *Jones v. Mersey Board*, (1865) 11 H. L. C. 443, that this was a mistake, and that the trustees of the Liverpool Docks were out of that fund to defray all expenses incident by law to the existence of the docks, and, as such, poor rates. We think, on the same principle, they are at liberty to apply the fund to the discharge of the liabilities which in execution of the Act, by keeping open the docks and warehouses, they must from time to time incur to their customers. [*The learned judge disposed of arguments based on the words of the empowering statutes, and continued.*]

Mr. Mellish argued that the whole scheme of the Legislature showed that the intention of the Legislature was to give to the

committee an uncontrolled discretionary power to compensate such persons as, in their opinion, ought to be compensated, and no others. He did not say the committee was to exercise this power capriciously, but *quasi* judicially, though without appeal; and he argued that the change of the constitution of the committee, by which one-half was to be elected by the ratepayers (though only introduced by the later Acts), rendered this less unlikely. But we do not think that such is the fair construction to be put on the enactments.

It is contrary to the general rule of law, not only in this country, but in every other, to make a person judge in his own cause, and though the Legislature can, and, no doubt, in a proper case would, depart from that general rule, an intention to do so is not to be inferred except from much clearer enactments than any to be found in these statutes.

We have gone through these enactments, and we think your Lordships will hardly be inclined to dispose of this important case on any of the special provisions peculiar to these Acts. As we have already intimated, in our opinion the proper rule of construction of such statutes is that, in the absence of something to show a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same things. This rule of construction was not admitted by the trustees. They did not rest their case exclusively, or even mainly, on any special provisions peculiar to their own private legislation, but upon broader grounds, which, if we do not mistake them, were in effect two.

They said that by the general law of this country, bodies such as the present are trustees for public purposes, and that being such, they are not in their corporate capacity liable to make compensation for damages sustained by individuals from the neglect of their servants and agents to perform the duties imposed on the corporation, or, at all events, that the duty of such corporations was limited to that of exercising due care in the choice of their officers, and that if they had properly selected their officers, any evil which ensued must be the fault of the officer, and that redress for it must be sought against him alone.

A great many cases were cited at your Lordships' bar as sup-

porting this position, many of which are really not applicable to such a case as the present. *Lane v. Cotton*, (1701) 1 Lord Raym. 646; and *Whitfield v. Le Despencer*, (1778) Cowp. 754 (the cases of the Postmaster General); and *Nicholson v. Mounsey*, (1812) 15 East 384 (the case of the captain of the man-of-war); are authorities that where a person is a public officer in the sense that he is a servant of the government, and as such has the management of some branch of the government business, he is not responsible for any negligence or default of those in the same employment as himself.

But these cases were decided upon the ground that the government was the principal, and the Defendant merely the servant. If an action were brought by the owner of goods against the manager of the goods traffic of a railway company for some injury sustained on the line, it would fail unless it could be shown that the particular acts which occasioned the damage were done by his orders or directions; for the action must be brought either against the principal, or against the immediate actors in the wrong (*Story on Agency*, s. 313). And all that is decided by this class of cases is, that the liability of a servant of the public is no greater than that of the servant of any other principal, though the recourse against the principal, the public, cannot be by an action. The principle is the same as that on which the surveyor of the highway is not responsible to a person sustaining injury from the parish ways being out of repair, though no action can be brought against his principals, the inhabitants of the parish. But the Defendants in the present action are not servants of the public in that sense. For this we need do no more than refer to the recent decision of your Lordships' House in *Jones v. Mersey Board*, where they were held to be rateable as occupiers of the docks on the very ground that they did not occupy as servants of the public or Government.

Another class of cases, also cited, depends upon the following principle. If the Legislature directs or authorizes the doing of a particular thing, the doing of it cannot be wrongful; if damage results from the doing of that thing it is just and proper that compensation should be made for it, and that is generally provided for in the statutes authorizing the doing of such things. But no action lies for what is *damnum sine injuria*; the remedy is to apply for compensation under the provision of the statutes legalizing

what would otherwise be a wrong. This, however, is the case, whether the thing is authorized for a public purpose or a private profit. No action will lie against a railway company for erecting a line of railway authorized by its Acts, so long as the directors pursue the authority given them, any more than it would lie against the trustees of a turnpike road for making their road under their Acts; though the one road is made for the profit of the shareholders in the company and the other is not. The principle is, that the act is not wrongful, not because it is for a public purpose, but because it is authorized by the Legislature: *Rex v. Pease*, (1832) 4 B. & A. 80. This, we think, is the point decided in *The Governors of the British Cast Plate Manufacturers v. Meredith*, (1792) 4 T. R. 794, *Sutton v. Clarke*, (1815) 6 Taunt. 29, and several other cases, as is well explained by Mr. Justice Williams in *Whitehouse v. Fellowes*, (1861) 10 C. B. (N.S.) 779.

But though the Legislature has authorized the execution of the works, it does not thereby exempt those authorized to make them from the obligation to use reasonable care that in making them no unnecessary damage be done. In *Brine v. The Great Western Railway Company*, (1862) 2 B. & S. 402, Mr. Justice Crompton says, 'the distinction is now clearly established between damage from works authorized by statutes, where the party generally is to have compensation, and the authority is a bar to an action, and damage by reason of the works being negligently done, as to which the owner's remedy by way of action remains.' [*Leader v. Moxon*, (1778) 3 Wils. 461; 2 W. Bl. 924, *Sutton v. Clarke*, (1815) 6 Taunt. 29; and *Jones v. Bird*, (1822) 5 B. & A. 837, *commented on.*]

And there is a considerable number of cases, to which we shall afterwards refer, in which, on this principle, actions have been held to lie against bodies executing works under the authority of statutes for the improper mode in which their powers have been executed, though the Defendants did not derive any profit from the execution of the works.

There are, however, authorities that bear the other way upon this part of the case; and it is necessary to examine these authorities in order to contrast them with the others. It will be for your Lordships then to decide on which side the preponderance of authority lies. Those in favour of the Defendant are *Hall v. Smith*, (1824) 2 Bing. 156, *Duncan v. Findlater*, (1839) 6 C. & F. 894, *Holliday*

'MERSEY DOCKS, ETC.' TRUSTEES v. GIBBS 168
v. *St. Leonard's, Shoreditch*, (1861) 11 C. B. (N.S.) 192, and
Metcalf v. Hetherington, (1855) 11 Ex. 257.

It is necessary, in considering these authorities, to bear in mind the distinction between the responsibility of a person who causes something to be done which is wrongful, or fails to perform something which there was a legal obligation on him to perform, and the liability for the negligence of those who are employed in the work.

This distinction is well stated in *Pickard v. Smith*, (1861) 10 C. B. (N.S.) 480, by Mr. Justice Williams, who says, 'Unquestionably no one can be made liable for an act or breach of duty, unless it be traceable to himself or his servant or servants in the course of his or their employment. Consequently, if an independent contractor is employed to do a lawful act, and in the course of the work, he or his servants commit some casual act of wrong or negligence, the employer is not answerable. That rule, however, is inapplicable to cases in which the act which occasions the injury is one which the contractor was employed to do; nor, by a parity of reasoning, to cases in which the contractor is entrusted with the performance of a duty incumbent upon his employer, and neglects its fulfilment, whereby an injury is occasioned.' 'If the performance of the duty be omitted, the fact of his having entrusted it to a person who also neglected it, furnishes no excuse either in good sense or law.'

Liability for the collateral negligence depends entirely upon the existence of the relation of master and servant between the employer and the person actually in default, according to the well-known exposition of the law in *Quarman v. Burnett*, (1840) 6 M. & W. 509, where Mr. Baron Parke says, 'Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stood in the relation of master to the wrongdoer, he who had selected him as his servant from the knowledge of or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey; and whether such servant has been appointed by the master directly, or immediately through the intervention of an agent authorized by him to appoint servants for him, can make no difference. But the liability by virtue of the principle of relation of master and servant must cease where the relation itself ceases to exist.'

In such a case as the present, the liability does not depend on that relation. Liability for doing an improper act depends upon the order given to do that thing; and the liability for an omission to do something depends entirely on the extent to which a duty is imposed to cause that thing to be done; and in the last two cases it is quite immaterial whether the actual actors are servants or not.

Now, in *Hall v. Smith*, (1824) 2 Bing. 156, the action was brought against the Commissioners for paving Birmingham (sued by their clerk), Norton, a surveyor, and Kimberley, a contractor, employed by them to make a sewer, for leaving a quantity of rubbish unguarded and unlighted, whereby the Plaintiff was thrown down and injured. The commissioners were authorised by an Act of Parliament to order the making of the sewer. 'No negligence,' says Lord Chief Justice Best, 'was imputed to the commissioners themselves; they had ordered the tunnel to be made, and left the making of it to the Defendants, Norton and Kimberley, the former of whom was the surveyor, and the latter the undertaker of the work. The accident happened to the Plaintiff from these persons not putting up rails, and not having lights during the night.' The close of his judgment is, that 'No action can be maintained against a man acting *gratuitously for the public* for the consequence of any act which he is authorized to do, and which, so far as he is concerned, is done with due care and attention; and that such a person is not answerable for the negligent execution of an order properly given.'

This, no doubt, is true; but it would be equally true if the Defendants, instead of being a body acting gratuitously for the public, had been a body, like railway directors, authorized to make the tunnel for their own profit. No action could have lain against them unless they stood in the relation of master to the parties actually guilty of negligence. This was not noticed by Chief Justice Best, as is pointed out in *Scott v. Mayor of Manchester*, (1856) 1 H. & N. 59. There, Mr. Baron Alderson says, '*Hall v. Smith* goes too far,—the person who selects the workmen is the party liable. Commissioners may get rid of liability by making contracts, but if they employ their own servants to do the work, they will be liable for the acts of such servants.' But, he adds, '*Hall v. Smith* was rightly decided upon the facts.'

But though what Chief Justice Best said in *Hall v. Smith* was

irrelevant, and therefore of less weight, still his opinion is an authority in favour of the defendants. It is, however, based upon a ground quite inapplicable to the present, or indeed to any modern case. He points out, clearly and forcibly, that it is harsh and impolitic to cast on individuals, acting gratuitously, a public duty, and make them responsible out of their private means for the non-fulfilment of it. But for many years it has been the practice of the Legislature to exempt the private means of commissioners from liability, either, as in the present series of Acts, by incorporating them, or by enabling them to sue and be sued in the name of a clerk, and restricting the execution to the property which they hold as commissioners. The basis of Chief Justice Best's reasoning fails, and *debile fundamentum fallit opus*.

Duncan v. Findlater, (1839) 6 C. & F. 894, was a Scotch appeal brought before the House of Lords on a bill of exceptions. [*The learned judge gave the facts and the decision.*]

Though all that really was decided in that case was, that the trustees [of a turnpike road] were not liable for the negligence of persons in their employment, who were not shewn to be their servants, it is not to be disputed that Lord Cottenham's language goes a great deal farther, and shows that, in his opinion, persons incorporated for the purpose of executing works, could never in their official or corporate capacity be liable to damages at all, the remedy for any wrong or neglect being only against the individual corporators for their individual wrong or neglect. His reasoning on this point is, 'If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided it. And this is clear, on the legal presumption that the act creating the damage, being within the statute, must be a lawful act. On the other hand, if the thing done is not within the statute, either from the party doing it having exceeded the powers conferred on him by statute, or from the manner in which he has thought fit to perform the work, why should the public fund be liable to make good his private error or misconduct?' Lord Cottenham is there speaking of a body of trustees acting under the Scotch Turnpike Act, but his reasoning is general. And the dilemma, if a good one, is applicable in all cases. This is, no doubt, a very high authority, being said by the Lord Chancellor in the House of Lords, though in a Scotch case, but not being the point decided

by the House, it is not conclusively binding, and we think that, with great deference to his high authority, we must dissent from the position there laid down, both on principle and on the preponderance of authority.

It is pointed out by Lord Campbell in *The Southampton and Itchin Bridge Company v. The Southampton Local Board of Health*, (1858) 8 E. & B. 801, that in every case the liability of a body created by statute must be determined upon a true interpretation of the statute under which it is created. And if the true interpretation of the statute is, that a duty is cast upon the incorporated body, not only to make the works authorized, but also to take proper care, and use reasonable skill, that the works are such as the statute authorizes, or, as in the present case, to take reasonable care that they are in a fit state for the use of the public who use them, there is, with great deference to Lord Cottenham, nothing illogical or inconsistent in holding that those injured by the neglect of the statutable body to fulfil the duty thus cast by the statute upon it, may maintain an action against that body, and be indemnified out of the funds vested in it by the statute.

Accordingly the Court of Queen's Bench, in *Ward v. Lee*, (1857) 7 E. & B. 426, and the Court of Common Pleas, in *Clothier v. Webster*, (1862) 12 C. B. (N.S.) 790, have expressed the opinion that an action lay against a local board of health, in its corporate capacity, for an injury sustained from making improper works. And in *The Southampton and Itchin Bridge Company v. The Southampton Local Board*, the point was expressly decided. And this decision was followed and approved of by the Court of Exchequer, in *Ruck v. Williams*, (1858) 3 H. & N. 808, where it was held that an action would lie against the Improvement Commissioners of Cheltenham (sued by their clerk) for the improper mode in which they caused a sewer to be made. And Mr. Baron Bramwell forcibly observed, 'I can well understand if a person undertakes the office or duty of a commissioner, and there are no means of indemnifying him against the consequences of a slip, it is reasonable to hold that he should not be responsible for it. I can also understand that if one of several commissioners does something not within the scope of his authority, the commissioners, as a body, are not liable; but where commissioners, who are a *quasi* corporate body, are not affected (i.e. personally) by the result of an action, inasmuch as they are authorized by Act

of Parliament to raise a fund for payment of the damages, on what principle is it that if an individual member of the public suffers from an act *bonâ fide* but erroneously done, he is not to be compensated? It seems to me inconsistent with actual justice, and not warranted by any principle of law.' [*Whitehouse v. Fellowes*, (1861) 10 C. B. (N.S.) 765, and *Brownlow v. Metropolitan Board*, (1863, 1864) 13 C. B. (N.S.) 768; 16 C. B. (N.S.) 546, *referred to*.]

It must rest with your Lordships to say whether those decisions, to which we have referred, are to be over-ruled. We think they are not consistent with Lord Cottenham's opinion. [*Holliday v. St. Leonard's, Shoreditch*, (1861) 11 C. B. (N.S.) 192, *referred to*.]

There remains only one further point to consider. The Acts under which the Liverpool Docks have been made contain, as has been already mentioned, clauses enabling the trustees of the docks to appoint water-bailiffs and harbour-masters, and confer on those officers powers of regulating the manner in which vessels shall enter the docks, &c. It was argued that the effect of these clauses was to confine the duty of the trustees to that of selecting proper officers, and that they could not be responsible further.

The case of *Metcalf v. Hetherington*, (1855) 11 Exch. 257, was cited as an authority for this position, and we think it is a decision much in point. The Court of Exchequer there, in construing the Maryport Harbour Act, attributed this effect to enactments not very dissimilar to those now in question, and we agree, if this was so, the consequence would follow that the Plaintiffs' remedy would be, not against those who appointed the officer, but only against the officer himself. But we cannot agree in so construing the present Acts. As has been already pointed out, clauses almost identical with those now in question are inserted in every harbour and dock Act, whether the docks be, as in the present case, the property of public commissioners, or of a trading company. And we cannot think that it was the intention of the Legislature to deprive a shipowner who pays dues to a wealthy trading company, such as the St. Catherine's Dock Company, for instance, of all recourse against it, and to substitute the personal liability of a harbour-master, no doubt a respectable person in his way, but whose whole means, generally speaking, would not be equal to more than a very small percentage of the damages, when there are any.

If these enactments are, in the present case, so construed as to

relieve the Mersey Board from liability, the corresponding enactments in the *Harbours, Piers, and Docks Clauses Act, 1847*, must also be so construed as to relieve all trading dock companies from liability, and that we think a *reductio ad absurdum*. This was not brought to the notice of the Court of Exchequer when deciding *Metcalfe v. Hetherington*. With the greatest respect for those who joined in that decision, we think it was erroneous.

For these reasons, we answer both your Lordships' questions in each of these cases in the affirmative, that is, in favour of the Plaintiffs below, the Respondents in error.

In accordance with this opinion, their Lordships dismissed both appeals.

✓ **ANDERSON v. GORRIE AND OTHERS, [1895] 1 Q. B. 668**

COURT OF APPEAL

Appeal from a judgment of Lord Coleridge C.J. in favour of the defendant Cook, at the trial with a jury.

The action was brought against three defendants, who were judges of the Supreme Court of Trinidad and Tobago, to recover damages for certain acts done by the defendants in the course of certain judicial proceedings, which acts were alleged to have been done maliciously and without jurisdiction and with knowledge of the absence of jurisdiction.

As to the defendant Cook, the jury found that he had overstrained his judicial powers, and had acted in the administration of justice oppressively and maliciously, to the prejudice of the plaintiff and to the perversion of justice, and they assessed the damages at 500*l*.

The learned judge directed judgment to be entered for the defendant Cook, on the ground that no action will lie against a judge of a Court of Record in respect of acts done by him in his judicial capacity.

The plaintiff appealed.

LORD ESHER M.R.—In this case an action was brought by the plaintiff against several judges of the Supreme Court of a colony for damages for wrongful acts done by them in committing him for contempt of Court, and in holding him to excessive bail.

The defendants were judges of a Supreme Court in a colony,

and the first question is whether these matters were matters with which they had jurisdiction to deal. As to the contempt of Court, it cannot be denied that they had jurisdiction to inquire whether a contempt had been committed, and further, it cannot be denied that they had power to hold a person to bail in the cases provided for by the colonial statute which expressly gives that power. These two matters were obviously within the jurisdiction of the Court. No one can doubt that if any judge exercises his jurisdiction from malicious motives he has been guilty of a gross dereliction of duty; but the question that arises is what is to be done in such a case. In this country a judge can be removed from his office on an address by both Houses of Parliament to the Crown. In a colony such an address is not necessary. The governor of the colony represents the Sovereign, and over him is the Secretary of State for the Colonies, who represents Her Majesty, and can direct the removal of the judge. But the existence of a remedy would not in either of these cases of itself prevent an action by a private person; so that the question arises whether there can be an action against a judge of a Court of Record for doing something within his jurisdiction, but doing it maliciously and contrary to good faith. By the common law of England it is the law that no such action will lie. The ground alleged from the earliest times as that on which this rule rests is that if such an action would lie the judges would lose their independence, and that the absolute freedom and independence of the judges is necessary for the administration of justice. That is the ground stated in *Miller v. Hope*, 2 Shaw Sc. App. Cas. 125, in the year 1824, by Lord Gifford in his judgment in the House of Lords; and in 1892, in *Haggard v. Pelicier Frères*, [1892] A. C. 61, at p. 68, Lord Watson says: 'It is due to the appellant to state that the respondents in their pleadings make no imputation of dishonesty; although their Lordships do not mean to suggest that such an imputation, if it had been made and proved, would have deprived him of the immunity which the law accords to a judge in his position.' Crompton J. in *Fray v. Blackburn*, (1863) 8 B. & S. 576, at p. 578, said: 'It is a principle of our law that no action will lie against a judge of one of the superior Courts for a judicial act, though it be alleged to have been done maliciously and corruptly. . . . The public are deeply interested in this rule, which indeed exists for their benefit, and was established in order to secure the indepen-

dence of the judges, and prevent their being harassed by vexatious actions.'

The reasons for the rule were more fully stated by Kelly C.B. in *Scott v. Stansfield*, (1868) L.R. 3 Ex. 220, and the only difficulty that has ever been raised on the point was that raised by Cockburn C.J. in *Thomas v. Churton*, (1862) 2 B. & S. 475, at p. 479. In that case the Chief Justice said: 'I am reluctant to decide, and will not do so until the question comes before me, that if a judge abuses his judicial office, by using slanderous words maliciously and without reasonable and probable cause, he is not to be liable to an action.' All I can say is, that I am convinced that had the question come before that learned judge he must and would, after considering the previous authorities, have decided that the action would not lie. That case was decided in 1862, and there are subsequent cases that confirm the principle which I have stated to be derived from the common law. The case of General Picton, *R. v. Picton*, (1804) 80 How. St. Tr. 225, has been cited to us; but it cannot be alleged that General Picton was acting as a judge, and therefore that case has no bearing on the matter before us. To my mind there is no doubt that the proposition is true to its fullest extent, that no action lies for acts done or words spoken by a judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office. If a judge goes beyond his jurisdiction a different set of considerations arise. The only difference between judges of the Superior Courts and other judges consists in the extent of their respective jurisdiction. It follows from what I have said that, taking the findings of the jury to be true to the fullest extent, the action will not lie against the defendant, and the appeal must be dismissed.

KAY and A. L. SMITH L.JJ. delivered short judgments to the same effect.

Appeal dismissed.

BUSHELL'S CASE,¹ (1670) 6 St. Tr. 999

COURT OF COMMON PLEAS

Bushell was the foreman of the jury at the trial of Penn and Mead, two Quakers, who were charged with tumultuous assembly

¹ The judgment in this case is long and difficult; only the more interesting

in the streets of London. The jury, although directed by the Recorder to convict the accused, returned a verdict of 'Not guilty,' and were thereupon committed to Newgate, until they should pay a fine of forty marks to the King. A writ of habeas Corpus having been obtained, and the return showing no just cause of imprisonment, they were released.

VAUGHAN C.J.— . . . In the present case it is returned, That the prisoner, being a jurymen, among others charged at the Sessions Court of the Old Bailey, to try the issue between the king, and Penn, and Mead, upon an indictment, for assembling unlawfully and tumultuously, did 'contra plenam et manifestam evidentiā,' openly given in court, acquit the prisoners indicted, in contempt of the king, &c.

The court hath no knowledge by this return, whether the evidence given were full and manifest, or doubtful, lame, and dark, or indeed evidence at all material to the issue, because it is not returned what evidence in particular, and as it was delivered, was given. For it is not possible to judge of that rightly, which is not exposed to a man's judgment. But here the evidence given to the jury is not exposed at all to this court, but the judgment of the Court of Sessions upon that evidence is only exposed to us; who tell us it was full and manifest. But our judgment ought to be grounded upon our own inferences and understandings, and not upon theirs. . . .

Hence it is apparent, that the commitment and return pursuing it, being in itself too general and uncertain, we ought not implicitly to think the commitment was *re vera*, for cause particular and sufficient enough, because it was the act of the court of sessions. . . .

Another fault in the return is, that the jurors are not said to have acquitted the persons indicted, against full and manifest evidence corruptly, and knowing the said evidence to be full and manifest against the persons indicted, for how manifest soever the evidence was, if it were not manifest to them, and that they believed it such, it was not a finable fault, nor deserving imprisonment, upon which difference the law of punishing jurors for false verdicts principally depends. . . .

and intelligible portions of it are here given. Many of the reasons for releasing the prisoners hardly carry conviction at the present day, on account of the transformation of the jury from a body of witnesses to judges of fact. This transformation was not complete in 1670.

I would know whether any thing be more common, than for two men students, barristers, or judges, to deduce contrary and opposite conclusions out of the same case in law? And is there any difference that two men should infer distinct conclusions from the same testimony? Is any thing more known than that the same author, and place in that author, is forcibly urged to maintain contrary conclusions, and the decision hard, which is in the right? Is any thing more frequent in the controversies of religion, than to press the same text for opposite tenets? how then comes it to pass that two persons may not apprehend with reason and honesty, what a witness, or many, say, to prove in the understanding of one plainly one thing, but in the apprehension of the other, clearly the contrary thing? Must therefore one of these merit fine and imprisonment, because he doth that which he cannot otherwise do, preserving his oath and integrity? And this often is the case of the judge and jury.

I conclude therefore, That this return, charging the prisoners to have acquitted Penn and Mead, against full and manifest evidence, first and next, without saying that they did know and believe that Evidence to be full and manifest against the indicted persons, is no cause of fine or imprisonment. [Of this mind were 10 judges of 11, the Chief Baron Turnor gave no opinion, because not at the arguments.]

And by the way I must here note, That the Verdict of a Jury, and Evidence of a Witness are very different things, in the truth and falsehood of them: A witness swears but to what he hath heard or seen, generally or more largely, to what hath fallen under his senses. But a jury-man swears to what he can infer and conclude from the testimony of such witnesses, by the act and force of his understanding, to be the fact inquired after, which differs nothing in the reason, though much in the punishment, from what a judge, out of various cases considered by him, infers to be the law in the question before him. Therefore Bracton, '*Et licet narratio facti contraria sit sacramento, et dicto præcedenti, tamen falsum non faciunt Sacramentum licet faciunt fatuum Judicium, quia loquuntur secundum conscientiam quia falli possunt in Judiciis suis, sicut ipse Justitiarius.*' Bract. f. 289. a. . . .

We come now to the next part of the Return, viz. 'That the jury acquitted those indicted against the direction of the court in matter of law, openly given and declared to them in court.'

1. The words, That the jury did acquit, against the direction of the court, in matter of law, literally taken, and *de plano*, are insignificant and not intelligible, for no issue can be joined of matter in law, no jury can be charged with the trial of matter in law barely, no evidence ever was, or can be given to a jury of what is law, or not; nor no such oath can be given to, or taken by, a jury, to try matter in law; nor no attaint can lye for such a false oath.

Therefore we must take off this vail and colour of words, which make a shew of being something, and in truth are nothing.

If the meaning of these words, finding against the direction of the court in matter of law, be, That if the judge having heard the evidence given in court (for he knows no other) shall tell the jury, upon this evidence, The law is for the plaintiff, or for the defendant, and you are under the pain of fine and imprisonment to find accordingly, then the jury ought of duty so to do; Every man sees that the jury is but a troublesome delay, great charge, and of no use in determining right and wrong, and therefore the trials by them may be better abolished than continued: which were a strange new-found conclusion, after a trial so celebrated for many hundreds of years.

For if the judge, from the evidence, shall by his own judgment first resolve upon any trial what the fact is, and so knowing the fact, shall then resolve what the law is, and order the jury penally to find accordingly, what either necessary or convenient use can be fancied of juries, or to continue trials by them at all?

But if the jury be not obliged in all trials to follow such directions, if given, but only in some sort of trials (as for instance, in trials for criminal matters upon indictments or appeals) why then the consequence will be, though not in all, yet in criminal trials, the jury (as of no material use) ought to be either omitted or abolished, which were the greater mischief to the people, than to abolish them in civil trials.

And how the jury should, in any other manner, according to the course of trials used, find against the direction of the court in matter of law, is really not conceivable.

True it is, if it fall out upon some special trial, that the jury being ready to give their Verdict, and before it is given, the judge shall ask, whether they find such a particular thing propounded by him? or whether they find the matter of fact to be as such a

witness, or witnesses have deposed? and the jury answer, they find the matter of fact to be so; if then the judge shall declare, The matter of fact being by you so found to be, the law is for the plaintiff, and you are to find accordingly for him.

If notwithstanding they find for the defendant, this may be thought a finding in matter of law against the direction of the court: for in that case the jury first declare the fact, as it is found by themselves, to which fact the judge declares how the law is consequent.

And this is ordinary, when the jury find unexpectedly for the plaintiff or defendant, the judge will ask, how do you find such a fact in particular? and upon their answer he will say, then it is for the defendant though they found for the plaintiff, or *é contrario*, and thereupon they rectify their verdict.

And in these cases the jury, and not the judge, resolve and find what the fact is.

Wherefore always in discreet and lawful assistance of the jury, the judge his direction is hypothetical, and upon supposition, and not positive, and upon coercion, viz. If you find the fact thus (leaving it to them what to find) then you are to find for the plaintiff; but if you find the fact thus, then it is for the defendant.

But in the case propounded by me, where it is possible in that special manner, the jury may find against the direction of the court in matter of law, it will not follow they are therefore finable; for if an attain will lie upon the verdict so given by them, they ought not to be fined and imprisoned by the judge for that verdict; for all the judges have agreed upon a full conference at Serjeants-Inn, in this case. And it was formerly so agreed by the then judges in a case where justice Hyde had fined a jury at Oxford, for finding against their evidence in a civil cause. That a jury is not finable for going against their evidence, where an attain lies; for if an attain be brought upon that verdict, it may be affirmed and found upon the attain a true verdict, and the same verdict cannot be a false verdict, and therefore the jury fined for it as such by the judge, and yet no false verdict, because affirmed upon the attain.

Another reason that the jury may not be fined in such case, is, because until a jury have consummated their verdict, which is not done until they find for the plaintiff or defendant, and that also be entered of Record; they have time still of deliberation, and

whatsoever they have answered the judge upon an interlocutory question or discourse, they may lawfully have from it if they find cause, and are not thereby concluded.

Whence it follows upon this last reason, that upon trials wherein no attain lies, as well as upon such where it doth, no case can be invented; wherein it can be maintained that a jury can find, in matter of law, nakedly against the direction of the judge.

And the judges were (as before) all of opinion that the return in this latter part of it, is also insufficient, as in the former, and so wholly insufficient. . . .

Without a fact agreed, it is as impossible for a judge, or any other, to know the law relating to that fact or direct concerning it, as to know an accident that hath no subject.

Hence it follows, that the judge can never direct what the law is in any matter controverted, without first knowing the fact; and then it follows, that without his previous knowledge of the fact, the jury cannot go against his direction in law, for he could not direct.

But the judge, *quâ* judge, cannot know the fact possibly but from the evidence which the jury have, but (as will appear) he can never know that evidence the jury have, and consequently he cannot know the matter of fact, nor punish the jury for going against their evidence, when he cannot know what their evidence is.

It is true, if the jury were to have no other evidence for the fact, but what is deposed in court, the judge might know their evidence, and the fact from it, equally as they, and so direct what the law were in the case, though even then the judge and jury might honestly differ in the result from the evidence, as well as two judges may, which often happens.

But the evidence which the jury have of the fact is much other than that: for,

1. Being returned of the vicinage, whence the cause of action ariseth, the law supposeth them thence to have sufficient knowledge to try the matter in issue (and so they must) though no evidence were given on either side in court, but to this evidence the judge is a stranger.

2. They may have evidence from their own personal knowledge, by which they may be assured, and sometimes are, that what is deposed in court, is absolutely false: but to this the judge is a stranger, and he knows no more of the fact than he hath learned

in court, and perhaps by false depositions, and consequently knows nothing.

8. The jury may know the witnesses to be stigmatized and infamous, which may be unknown to the parties, and consequently to the court.

4. In many cases the jury are to have view necessarily, in many, by consent, for their better information; to this evidence likewise the judge is a stranger.

5. If they do follow his direction, they may be attainted and the judgment reversed for doing that, which if they had not done, they should have been fined and imprisoned by the judge, which is unreasonable.

6. If they do not follow his direction, and be therefore fined, yet they may be attainted, and so doubly punished by distinct judicatures for the same offence, which the common law admits not. . . .

7. To what end is the jury to be returned out of the vicinage, whence the cause of action ariseth? To what end must hundredors be of the jury, whom the law supposeth to have nearer knowledge of the fact than those of the vicinage in general: To what end are they challenged so scrupulously to array and pole? To what end must they have such a certain free-hold, and be 'probi et legales homines,' and not of affinity with the parties concerned? To what end must they have in many cases the view, for their exacter information chiefly? To what end must they undergo the heavy punishment of the villanous judgment, if after all this they implicitly must give a verdict by the dictates and authority of another man, under pain of fines and imprisonment, when sworn to do it according to the best of their own knowledge?

A man cannot see by anothers eye, nor hear by anothers ear, no more can a man conclude or infer the thing to be resolved by anothers understanding or reasoning; and though the verdict be right the jury give, yet they being not assured it is so from their own understanding, are forsworn, at least *in foro conscientie*.

9. It is absurd a jury should be fined by the judge for going against their evidence, when he who fineth knows not what it is, as where a jury find without evidence, in court of either side, so if the jury find, upon their own knowledge, as the course is if the defendant plead solvit ad diem, to a bond proved, and offers

no proof. The jury is directed to find for the plaintiff, unless they know payment was made of their own knowledge, according to the plea. [14 H. 7. f. 29 *per Vavasor in Camer. Scacc. without contradiction Hob. f. 227.*]

And it is as absurd to fine a jury for finding against their evidence, when the judge knows but part of it; for the better and greater part of the evidence may be wholly unknown to him, and this may happen in most cases, and often doth. . . .

That Decantatum in our books, 'ad quæstionem facti non respondent Judices, ad quæstionem legis non respondent Juratores,' literally taken is true; for if it be demanded, What is the fact? the Judge cannot answer it: if it be asked, What is the law in the case, the Jury cannot answer it.

Therefore the parties agree the fact by their pleading upon Demurrer, and ask the Judgment of the Court for the law.

In special verdicts the Jury inform the naked fact, and the Court deliver the law; and so is it in Demurrers upon evidence, in arrest of judgments upon challenges, and often upon the judge's opinion of the evidence given in Court, the plaintiff becomes nonsuit, when if the matter had been left to the Jury, they might well have found for the plaintiff.

But upon all general issues; as upon not culpable pleaded in trespass, 'nil debet' in debt, 'nul tort, nul disseisin' in assize, 'ne disturba pas' in 'quare impedit', and the like; though it be matter of law whether the defendant be a trespasser, a debtor, disseisor, or disturber in the particular cases in issue; yet the jury find not (as in a special verdict) the fact of every case by itself, leaving the law to the court, but find for the plaintiff or defendant upon the issue to be tried, wherein they resolve both law and fact complicately, and not the fact by itself; so as though they answer not singly to the question what is the law, yet they determine the law in all matters, where issue is joined, and tried in the principal case, but where the verdict is special.

The prisoners were discharged.

SECRETARY OF STATE FOR HOME AFFAIRS v. O'BRIEN

[1923] A. C. 608

HOUSE OF LORDS

VISCOUNT FINLAY.—My Lords, the question is whether your Lordships' House has jurisdiction to hear this appeal.

The Restoration of Order in Ireland Act, 1920, became law on August 9, 1920, and by s. 1, sub-s. 1, of that Act it was provided that His Majesty in Council may issue regulations under the Defence of the Realm Consolidation Act, 1914, for securing the restoration and maintenance of order in Ireland.

By an Order in Council dated August 18, 1920, made in pursuance of the said Act, it was provided that the Defence of the Realm Regulations then operative should, subject to certain modifications, apply and be regulations under the said Act. One of these regulations so applied and modified was Regulation 14 B, which provides for the internment, by order of the Secretary of State, of any person suspected of acting or being about to act in a manner prejudicial to order in Ireland.

On March 7, 1923, the Secretary of State made an order that the respondent, Mr. Art O'Brien, should be interned in the Irish Free State in such place as the Irish Free State Government may determine.

On April 10, 1923, application was made ex parte on behalf of the respondent, Mr. Art O'Brien, to a Divisional Court for a rule nisi for a writ of habeas corpus directed to the Secretary of State. The Court refused the writ, but on April 13, 1923, the following order was made by the Court of Appeal:—

'IN THE COURT OF APPEAL.

'ON APPEAL FROM THE HIGH COURT OF JUSTICE.

'KING'S BENCH DIVISION.

'Friday the 13th day of April, 1923.

'ENGLAND.—Upon reading the affidavit of Art O'Brien and the several exhibits therein referred to it is ordered that Monday the 23rd day of April instant be given to His Majesty's Secretary of State for Home Affairs to show cause why a writ of habeas corpus should not issue directed to him to have the body of Art O'Brien immediately before this Court at the Royal Courts of Justice London to undergo and receive all and singular such matters and things as this Court shall then and there consider of concerning him in this behalf.

'Upon notice of this order to be given to His Majesty's Secretary of State for Home Affairs in the meantime.'

On May 9, 1923, after argument for the Secretary of State and for Mr. Art O'Brien, the Court of Appeal made the following order;—

'IN THE COURT OF APPEAL.

'ON APPEAL FROM THE HIGH COURT OF JUSTICE.

'KING'S BENCH DIVISION (ENGLAND).

'Wednesday the 9th day of May 1923.

'Upon reading the affidavit of the Right Honourable William Clive Bridgeman and upon hearing Mr. Attorney-General of Counsel for His Majesty's Secretary of State for Home Affairs and Mr. Hastings of counsel for Art O'Brien It is ordered that a writ of habeas corpus do issue directed to His Majesty's Secretary of State for Home Affairs commanding him to have the body of Art O'Brien immediately before this Court at the Royal Courts of Justice London to undergo and receive all and singular such matters and things as this Court shall then and there consider of concerning him in this behalf And it is ordered that the said Secretary of State for Home Affairs be allowed until the 16th day of May instant within which to make his return to the said writ.

'With liberty to apply,

'BY THE COURT.'

The case filed on behalf of the Secretary of State on this appeal contains the following statements with regard to the proceedings in the Divisional Court, and in the Court of Appeal:—

'The King's Bench Division overruled the contentions of the respondent for reasons which are fully set out in the judgment of the Lord Chief Justice to which the appellant respectfully craves leave to refer.

'The Court of Appeal held that the effect of the enactment of the Irish Free State Constitution Act was to deprive the appellant of any power to order the internment of any person in the Irish Free State because it was a necessary incident of any valid order of internment that the interned person should remain under the control of the appellant, and the effect of the Irish Free State Constitution Act was to prevent any person interned in the Irish Free State from being under his control.

'Lord Justice Atkin further held that the form of the order was bad, and that the effect of the Orders in Council of the 27th of March 1923 and the 21st of April 1923 was to render any order of internment in the Irish Free State invalid. Lord Justice Bankes expressed no opinion on these two points, and Lord Justice Scrutton held the said Orders in Council to be ultra vires and invalid. The Court further held that although the appellant had lost the legal control of the respondent so

as to render the order of internment bad, he had not necessarily lost the de facto control, and that the rule should be made absolute in order to compel him to make a return to it.'

It is therefore clear that the ground on which the Court of Appeal made the rule absolute was that the order of internment was invalid.

Under these circumstances is the present appeal competent? In my opinion this question must be answered in the negative.

In *Cox v. Hakes*, (1890) 15 App. Cas. 506, the Rev. Mr. Cox had been arrested under a writ de contumace capiendo. A rule nisi for a habeas corpus was obtained on the ground that the arrest was illegal. The Queen's Bench Division (Lord Coleridge C.J. and A. L. Smith J.) made the rule absolute. The Court of Appeal reversed this decision, holding that s. 19 of the Supreme Court of Judicature Act, 1873, gives an appeal from orders made on application for habeas corpus, whether the order granted or refused the writ, and decided that the writ de contumace capiendo had been lawfully issued. On appeal to the House of Lords the decision of the Court of Appeal was set aside on the ground that where a person has been discharged from custody by an order of the High Court under a habeas corpus the Court of Appeal has no jurisdiction to entertain an appeal from the order.

The Attorney-General on the present appeal argued that the decision in *Cox's Case* was distinguishable from the present, inasmuch as there had been an order of discharge in the Queen's Bench Division, and Mr. Cox had been actually discharged under that order, while in the present case the rule for a habeas corpus had merely been made absolute without any order of discharge or any actual discharge. It was argued that the decision in *Cox's Case* proceeded really upon the ground that there was no machinery for rearrest, when discharge had once taken place on habeas corpus, and that it was therefore inapplicable to the present case, where there had been no discharge.

I agree that the decision in *Cox's Case* does not in terms apply to the present case, but the question remains whether on principle the two cases stand on the same footing.

Lord Herschell, in *Cox's Case*, said: 'It is unnecessary to determine whether an appeal would lie from an order for a writ of habeas corpus if it were brought to the Court of Appeal before there had been a discharge under it. No such point arises here.'

The point now arises and it must be determined. In my opinion when the substance of the thing is looked at it is plain that there is no real difference between the two cases, and that the order of the Court of Appeal that a writ of habeas corpus do issue directed to the Secretary of State commanding him to have the body of Art O'Brien before the Court of Appeal is no more appealable than the order of discharge itself if it had been made upon the return.

The Court of Appeal had decided that the detention was illegal, and it was on this ground, and on this ground only, that the order for the issue of the writ was made.

The writ of habeas corpus is a writ of right; it is not, however, grantable as of course, but on probable cause for it being shown: *Hobhouse's Case*, (1820) 3 B. & Ald. 420. To avoid the inconvenience of unnecessarily bringing up the body, possibly from a distance, the practice grew up of having a rule nisi for the issue of the writ. The present practice is stated in rr. 217 and 218, which will be found in Short and Mellor's Practice of the Crown Office, 2nd ed., p. 320. These rules are as follows:—

'R. 217.—If made to the Court, the application shall be by motion for an order, which if the Court so direct may be made absolute ex parte for the writ to issue in the first instance; or if the Court so direct they may grant an order nisi.'

'R. 218.—If made to a Judge he may order the writ to issue ex parte in the first instance, or may direct a summons for the writ to issue.'

On the rule nisi the case is argued upon the merits, and if the Court holds the detention illegal there is a rule absolute for the issue of the writ and the body is brought up and discharge ordered. Under the old practice the writ issued on an ex parte application and the matter was disposed of at once. It would be strange if proceeding by rule nisi gives an appeal when if it were issued on an ex parte application there would be none.

The matter was really disposed of in the present case when the Court of Appeal delivered judgment to the effect that the order of internment was invalid. O'Brien was entitled to his discharge and a custody which the Court had declared to be illegal could not properly be continued for any time beyond that which was necessary for carrying through the formal proceedings culminating in the order for discharge.

The Court of Appeal in its order of May 9 fixed May 16 as the

date on which the return was to be made. It was conceded in argument at your Lordships' Bar that when that day arrived O'Brien would be entitled to his discharge. Mr. Patrick Hastings on behalf of O'Brien during the argument asked that the case in the House of Lords should be adjourned until after that date, and that if this had been granted he would have been discharged from custody and the appeal of the Secretary of State would be purposeless, as the man would be at liberty, and, as was shown in *Cox's Case*, there would be no process available for having him remanded into custody. Indeed it was only the fact that the hearing of the appeal to the House of Lords had been expedited by consent, so that it came on before May 16, that made it possible for the Secretary of State to raise this argument. I cannot think that there is any substance in it.

We must deal with the substance of the matter. When it has been decided that the detention of any person is illegal he is entitled to be discharged, and I do not think that a detention which *ex hypothesi* would be unlawful could be relied upon for the purposes of supporting a right of appeal. The Court of Appeal granted the delay of a week for the return to the writ of habeas corpus. We must, however, I think, look at this case as if O'Brien had been set at liberty, which was his right according to the judgment which the Court of Appeal had just pronounced.

The Attorney-General in his argument for the Secretary of State relied upon the decision of the House of Lords in *Barnardo v. Ford*, [1892] A. C. 826. In my opinion that case bears no analogy to the present. It was a case in which the mother claimed to have the custody of her boy. The boy had been in one of Dr. Barnardo's Homes but had been sent to Canada. The issue of a writ of habeas corpus had been ordered by the Queen's Bench Division and affirmed by the Court of Appeal. The House of Lords held that the case was one in which an appeal lay under s. 19 of the Supreme Court of Judicature Act, 1873, from the Divisional Court to the Court of Appeal, and itself entertained an appeal from the Court of Appeal and held, affirming their order, that, without expressing any opinion as to the circumstances under which the child was sent to Canada, the writ ought to issue on the ground that the applicant was entitled to require a return to be made to the writ in order that the facts might be more fully investigated. There had been in that case no adjudication that the person was entitled

to be discharged and no objection to the appeal was possible on any such ground as that which arises in the present case.

The distinction between cases such as the present and cases such as *Ford's case* was very clearly stated in the Court of Appeal in *Reg. v. Barnardo*, [1891] 1 Q. B. 194, 204, 209-10, 214. Lord Esher M.R. said: 'The procedure' (habeas corpus) 'generally and originally has been used for the purpose of bringing up persons whose liberty was alleged to be actually interfered with; but the writ has also always been used with respect to the custody of infants, in order to determine whether the person who has the actual custody of them as children shall continue to have the custody of them as children. In such cases it is not a question of liberty, but of nurture, control, and education.' It was accordingly held that the decision in *Cox's Case* had no application to such cases as to infants. Lindley L.J. expressed himself in similar terms. 'But then it is said that no appeal lies from the order directing a writ of habeas corpus to issue, and reliance was placed on the recent decision of the House of Lords in *Cox v. Hakes*. That decision, however, appears to me to have no application to such a case as this. The question whether a person in prison ought to be set at liberty or not is entirely different from the question which of several persons ought to have the custody of a child.' Lopes L.J. expressed himself to the same effect.

In my opinion this House has no jurisdiction to hear this appeal.

EARL OF BIRKENHEAD.— . . . The writ with which we are concerned to-day was more fully known as habeas corpus ad subjiciendum. This writ, however, was one of many. Thus there was a writ of ad respondendum, ad satisfaciendum, ad prosequendum, ad testificandum, and ad deliberandum. All these writs exhibited many features in common; but the most characteristic element of all was their peremptoriness. To-day the substitution of more modern remedies has left the writ ad subjiciendum, more shortly known as the writ of habeas corpus, in almost exclusive possession of the field. It is perhaps the most important writ known to the constitutional law of England, affording as it does a swift and imperative remedy in all cases of illegal restraint or confinement. It is of immemorial antiquity, an instance of its use occurring in the thirty-third year of Edward I. It has through the ages been jealously maintained by Courts of Law as a check upon the illegal usurpation of power by the Executive at the cost of the liege.

In the course of time certain rules and principles have been evolved; and many of these have been declared so frequently and by such high authority as to become elementary. Perhaps the most important for our present purpose is that which lays it down that if the writ is once directed to issue and discharge is ordered by a competent Court, no appeal lies to any superior Court. Correlative with this rule, and markedly indicative in itself of the spirit of our law, is that other which establishes that he who applies unsuccessfully for the issue of the writ may appeal from Court to Court until he reaches the highest tribunal in the land. If I am right in treating these rules as familiar and well settled, some curiosity may be felt as to the grounds which led the present appellant, advised as he has been by the law officers of the Crown, to assume that an appeal lay to this House in the circumstances of the present case. The argument is, of course, founded upon the very wide language of s. 8 of the Appellate Jurisdiction Act, 1876, which is undoubtedly general enough to cover this or almost any other case. It is certainly true that in terms the words are wide enough to give an appeal in such a matter as the present. But I should myself, if I approached the matter without the assistance of the authority at all, decline utterly to believe that a section couched in terms so general availed to deprive the subject of an ancient and universally recognized constitutional right. But happily we are in a position to approach the matter with even greater confidence, for in *Cox v. Hakes*, (1890) 15 App. Cas. 506, a very similar matter was debated and decided by this House. The argument in that case depended on the language of s. 19 of the Supreme Court of Judicature Act, 1873, but this section was in its statement of competent appeal as sweeping as s. 8 of the Appellate Jurisdiction Act, 1876. The guidance and the authority of the decision upon the earlier Act are therefore fully available for our purposes in the present appeal. It was established and indeed very often repeated in the learned judgments which were delivered in *Cox v. Hakes* that if upon the return to the writ it was adjudged that no legal ground was made to appear justifying detention, the consequence was immediate release from custody, and if discharge followed, the legality of such discharge could never again be brought in question. Lord Halsbury L.C. summarized the matter in the following sentence (15 App. Cas. 522): 'It is the right of personal freedom in this country which is in

debate; and I for one should be very slow to believe, except it was done by express legislation, that the policy of centuries has been suddenly reversed, and that the right of personal freedom is no longer to be determined summarily and finally, but is to be subject to the delay and uncertainty of ordinary litigation, so that the final determination upon that question may only be arrived at by the last Court of Appeal.'

All the judgments in the case will repay study; but while they illustrate and elaborate the conclusion so lucidly declared by Lord Halsbury, they do not perhaps add anything which is material to our present purpose. It follows, therefore, from *Cox's Case* that no appeal lies to the Court of Appeal where discharge has been ordered: and the language of the relevant statutes being for the present purpose indistinguishable, it equally follows by parity of reasoning that no appeal lies in the present matter to the House of Lords, unless upon some ground of principle the present case can be distinguished from *Cox's Case*. . . .

LORD DUNEDIN and LORD SHAW OF DUNFERMLINE delivered judgments to the same effect. LORD ATKINSON delivered a dissenting judgment.

Order of the Court of Appeal confirmed and appeal dismissed.

Extract from

FERGUSON v. EARL OF KINNOUL, (1842) 9 Cl. & F. at p. 811

HOUSE OF LORDS (SCOTTISH APPEAL)

LORD CAMPBELL.—In the first place, it is said that the Presbytery is a Court, and that this was a judicial proceeding; wherefore no action can be maintained against the members of the Court although their judgment be erroneous. There can be no doubt that for many purposes the Presbytery is a Court, and that it has not only ecclesiastical functions, but jurisdiction in certain civil matters, such as the allotting of glebes, and the repair of kirks and manses. Where the Presbytery is acting judicially, or in any matter where its members have a discretion to exercise, no action could be maintained against them, at least without malice expressly charged and clearly proved. If they had taken Mr. Young on trial, and adjudged that he was not qualified, from

being *minus sufficiens in literatura*, or from any objection to his orthodoxy or his morals, or that from some personal defect he was incapable of satisfactorily serving the cure, their judgment could not have been reviewed by any Civil Court; and certainly no action would have lain against them on the allegation that in truth he was well qualified and free from all objection. The Church Judicatories, acting within their jurisdiction, must ever be respected and upheld. But when the members of the Presbytery were required to take Mr. Young on trial, in my opinion they were required to do a mere ministerial act. Touching that act they had no discretion; they had no judgment to exercise. How then could it be judicial? There is no difficulty whatever in separating the act of appointing him to appear before them to be examined, and the act of forming a judgment upon his qualifications when he has appeared before them and been examined. It is for a refusal to do the first act that this action is brought, and the first act is purely ministerial.

Where there is a ministerial act to be done by persons who on other occasions act judicially, the refusal to do the ministerial act is equally actionable as if no judicial functions were on any occasion entrusted to them. There seems no reason why the refusal to do a ministerial act by a person who has certain judicial functions should not subject him to an action, in the same manner as he is liable to an action for an act beyond his jurisdiction. The refusal to do the ministerial act is as little within the scope of his functions as Judge, as the act where his jurisdiction is exceeded. In the act beyond his jurisdiction he has ceased to be a Judge. As to the ministerial act, which may be initiatory to a judicial proceeding, he is not yet clothed with the judicial character.

In the able argument on behalf of the Appellants at the bar, it has hardly been denied that the action is maintainable, if the act to be done was of a ministerial nature; for the general proposition that public functionaries appointed to act ministerially are liable to an action at the suit of any one who suffers damage from their breach of duty, was not disputed. Everything, therefore, turns on the quality of the act; and how is the act of the Presbytery in taking the presentee on trial, to be distinguished from the act of the Archdeacon or of the Bishop in inducting to a living? The Archdeacon and the Bishop have both judicial functions; but in inducting to a living, where the right is ascertained, they have to

do a ministerial act; and for wrongfully refusing to do that act the law gives an action to recover damages against them, to the parties aggrieved.

R. v. ELECTRICITY COMMISSIONERS. *Ex parte* LONDON ELECTRICITY JOINT COMMITTEE COMPANY (1920), LIMITED; AND OTHERS, [1924] 1 K. B. 171.

COURT OF APPEAL

The respondents were entrusted by the Electricity (Supply) Act, 1919, with wide, but strictly defined powers to formulate schemes for the improvement of the electricity supply and for that purpose to hold local inquiries. They were empowered to make an order giving effect to such a scheme, which would have no force of itself, but after confirmation by the Minister of Transport and on approval by resolution of both Houses of Parliament was to have effect as if enacted in the Act of 1919.

The respondents having commenced an inquiry in the London area, the appellants applied to the King's Bench Division for writs of prohibition and certiorari on the ground that the scheme contemplated was ultra vires, and the respondents had therefore no jurisdiction to hold the inquiry. The Divisional Court discharged both rules. On appeal from their decision it was held by the Court of Appeal that the Electricity Commissioners had in point of fact no jurisdiction.

ATKIN L.J. [*after discussing the facts continued*]: The question now arises whether the persons interested are entitled to the remedy which they now claim in order to put a stop to the unauthorized proceedings of the Commissioners. The matter comes before us upon rules for writs of prohibition and certiorari which have been discharged by the Divisional Court. Both writs are of great antiquity, forming part of the process by which the King's Courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed. It is to be noted that both writs deal with questions of excessive jurisdiction, and doubtless in their origin dealt almost exclusively with the jurisdiction of what is described in ordinary parlance as a Court of Justice. But the operation of the writs

has extended to control the proceedings of bodies which do not claim to be, and would not be recognized as, Courts of Justice. Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs. Thus certiorari lies to justices of the peace of a county in respect of a statutory duty to fix a rate for the repair of a county bridge: *Rex v. Inhabitants in Glamorganshire*, (1700) 1 Ld. Raym. 580; and to Poor Law Commissioners acting under the Poor Law Amendment Act, 1834, in prescribing the constitution of a board of guardians in a parish where there was an existing poor law authority: *Rex v. Poor Law Commissioners*, (1887) 6 A. & E. 1. In that case it may be noted that the Attorney-General had obtained a rule for a mandamus to the new board of guardians to obey the order of the Commissioners, and Sir Frederick Pollock subsequently obtained a rule for a certiorari to bring up the order to be quashed; and by agreement the question was argued on the rule for a certiorari. So certiorari has gone to the Board of Education to bring up and quash their determination under s. 7, sub-s. 8, of the Education Act, 1902, on a question arising between the local education authority and the managers of a non-provided school: *Board of Education v. Rice*, [1911] A. C. 179. Also to justices acting under the Licensing Act, and not in the strict sense as a court: *Rex v. Woodhouse*, [1906] 2 K. B. 501. Similarly prohibition has gone to the Tithe Commissioners, and an assistant Tithe Commissioner, to prevent them from making an award as to the tithes in a particular parish: *In re Crosby Tithes*, (1849) 13 Q. B. 761, and to the Inclosure Commissioners from reporting the proposed inclosure of a common in the parish of Acton, and from taking any further step towards the inclosure of the common: *Church v. Inclosure Commissioners*, (1862) 11 C. B. (N.S.) 664. So it has gone against the Light Railway Commissioners to restrain them from proceeding with an inquiry remitted to them by the Board of Trade after an appeal which it was held did not lie: *Rex v. Board of Trade*, [1915] 3 K. B. 586. Here the right to prohibition was not raised by counsel, as a decision was desired on the point as to the validity of the appeal, but the point was raised in the dissenting judgment of Phillimore L.J., and must, I think, have been present to the minds of the majority of the

Court. I can see no difference in principle between certiorari and prohibition, except that the latter may be invoked at an earlier stage. If the proceedings establish that the body complained of is exceeding its jurisdiction by entertaining matters which would result in its final decision being subject to being brought up and quashed on certiorari, I think that prohibition will lie to restrain it from so exceeding its jurisdiction. Reference was made to the case of *In re Clifford and O'Sullivan*, [1921] 2 A. C. 570, where an attempt was made to prohibit the proceedings of so-called military courts of the Army in Ireland acting under proclamations which had placed certain Irish districts in a time of armed disturbance under martial law. Prohibition, it was held in the House of Lords, would not lie because the so-called courts were not claiming any legal authority other than the right to put down force by force, and because the so-called courts were *functæ officio*. I am satisfied that the observations of the Lord Chancellor in that case were directed to the first point, and that he had no intention of overruling, or indeed questioning, the long line of authority which has extended the writs in question to bodies other than those who possess legal authority to try cases, and pass judgments in the strictest sense.

In the present case the Electricity Commissioners have to decide whether they will constitute a joint authority in a district in accordance with law, and with what powers they will invest that body. The question necessarily involves the withdrawal from existing bodies of undertakers of some of their existing rights, and imposing upon them of new duties, including their subjection to the control of the new body, and new financial obligations. It also provides in the new body a person to whom may be transferred rights of purchase which at present are vested in another authority. The Commissioners are proposing to create such a new body in violation of the Act of Parliament, and are proposing to hold a possibly long and expensive inquiry into the expediency of such a scheme, in respect of which they have the power to compel representatives of the prosecutors to attend and produce papers. I think that in deciding upon the scheme, and in holding the inquiry, they are acting judicially in the sense of the authorities I have cited, and that as they are proposing to act in excess of their jurisdiction they are liable to have the writ of prohibition issued against them.

It is necessary, however, to deal with what I think was the main objection of the Attorney-General. In this case he said the Commissioners come to no decision at all. They act merely as advisers. They recommend an order embodying a scheme to the Minister of Transport, who may confirm it with or without modifications. Similarly the Minister of Transport comes to no decision. He submits the order to the Houses of Parliament, who may approve it with or without modifications. The Houses of Parliament may put anything into the order they please, whether consistent with the Act of 1919, or not. Until they have approved, nothing is decided, and in truth the whole procedure, draft scheme, inquiry, order, confirmation, approval, is only part of a process by which Parliament is expressing its will, and at no stage is subject to any control by the Courts. It is unnecessary to emphasize the constitutional importance of this contention. Given its full effect, it means that the checks and safeguards which have been imposed by Act of Parliament, including the freedom from compulsory taking, can be removed, and new and onerous and inconsistent obligations imposed without an Act of Parliament, and by simple resolution of both Houses of Parliament. I do not find it necessary to determine whether, on the proper construction of the statute, resolutions of the two Houses of Parliament could have the effect claimed. In the provision that the final decision of the Commissioners is not to be operative until it has been approved by the two Houses of Parliament I find nothing inconsistent with the view that in arriving at that decision the Commissioners themselves are to act judicially and within the limits prescribed by Act of Parliament, and that the Courts have power to keep them within those limits. It is to be noted that it is the order of the Commissioners that eventually takes effect; neither the Minister of Transport who confirms, nor the Houses of Parliament who approve, can under the statute make an order which in respect of the matters in question has any operation. I know of no authority which compels me to hold that a proceeding cannot be a judicial proceeding subject to prohibition or certiorari because it is subject to confirmation or approval, even where the approval has to be that of the Houses of Parliament. The authorities are to the contrary.

In *In re Crosby Tithes*, where prohibition went to the Tithe Commissioners, the Assistant Commissioner, with a view to commutation of tithes, had held an inquiry into the value of certain

disputed tithes, and had declared his intention of awarding a particular amount to the vicar. By the Tithe Commutation Act of 1836, s. 50, the Commissioner was not empowered to draft his award until certain pending suits were decided, and there being such a suit pending, prohibition went to the Commissioners and the Assistant Commissioner. It is to be noted that when the writ was granted the Assistant Commissioner had not even drafted his award, but had merely stated his intention so to do, and to ignore the pending suit, and that his award, when drafted, was subject to objection, and to amendment after a further hearing of such objections (s. 51), and was then subject to confirmation by the Commissioners. In *Church v. Inclosure Commissioners*, the writ of prohibition was issued to prohibit the Commissioners from reporting the proposed inclosure of Old Oak Common in the parish of Acton for the sanction of Parliament, and from taking any further steps towards the inclosure of the said common, without first obtaining certain consents. An Assistant Commissioner had held an inquiry and made a report to the Commissioners, who had made a provisional order providing for inclosure. The Assistant Commissioner had wrongly estimated the values of the interests in question, which was the ground of the invalidity relied on. The inclosure in question, being within fifteen miles of the City of London, could not be made without the authority of Parliament under s. 14 of the Commons Inclosure Act, 1845. By s. 27 of the Act, in such a case, after making the provisional order, it was the duty of the Commissioners to publish it, to verify consents, and to certify in their annual report the expediency of the inclosure, and by s. 32 the provisional order would only become operative when enacted in an Act of Parliament. It is noteworthy that the Court (Erle C.J. and Vaughan Williams, Willes and Keating JJ.) thought the matter so clear that they refused the request of counsel for the Commissioners that the prosecutor should declare in prohibition to give an opportunity of questioning whether prohibition would lie in such a case (see 11 C. B. (N.S.) 682, note a). I cannot distinguish that case from the present.

The case of *Reg. v. Hastings Local Board*, (1865) 6 B. & S. 401, which was relied on by the Divisional Court, seems to me to be of little assistance. The application was for a writ of certiorari to bring up to be quashed a provisional order of the Secretary of State made pursuant to the Local Government Act of 1858,

whereby the Hastings Local Board was empowered to put in force the powers of the Lands Clauses Act in respect of certain land required for widening a road. The material section expressly provided that the order of the Secretary of State should not be of any validity unless the same had been confirmed by Act of Parliament, and at the time of the application no confirming Act of Parliament had been obtained. It seems quite clear that there was no order in existence in respect of which certiorari could be granted, and all the judges were of opinion that the Secretary of State was in the same position as a Select Committee to whom a Bill for such a purpose might be referred. Blackburn J. stated that the order was not a judicial one. No authorities were cited to the Court. I cannot consider this case, or the Irish case cited which followed it (*In re Local Government Board; Ex parte Kingstown Commissioners*, (1885) 16 L. R. Ir. 150; 18 *ibid.* 509), to be inconsistent with the principles on which is based the decision in *Church v. Inclosure Commissioners*. If there were any inconsistency I prefer the authority of the latter case.

In coming to the conclusion that prohibition should go we are not in my opinion in any degree affecting, as was suggested, any of the powers of Parliament. If the above construction of the Act is correct the Electricity Commissioners are themselves exceeding the limits imposed upon them by the Legislature, and so far from seeking to diminish the authority of Parliament we are performing the ordinary duty of the Courts in upholding the enactments which it has passed. Nothing we do or say could in any degree affect the complete power of the Legislature by Act of Parliament to carry out the present scheme, or any other scheme. All we say is that it is not a scheme within the provisions of the Act of 1919. That it is convenient to have the point of law decided before further expense and trouble are incurred seems beyond controversy. I think therefore that the appeal should be allowed, so far as the writ of prohibition is concerned, and that the rule for the issue of the writ should be made absolute.

So far as the writ of certiorari is concerned, the matter becomes unimportant. I have considerable doubt whether there is any such definite order as could be made the subject of certiorari, and in this respect I think that the appeal should be dismissed without costs.

BANKES and YOUNGER L.JJ. delivered concurring judgments.

Appeal allowed.

REG. v. RAND AND OTHERS, (1866) L. R. 1 Q. B. 230

QUEEN'S BENCH

The judgment of the Court (Cockburn C.J., Blackburn and Shee JJ.) was delivered by

BLACKBURN J.—In this case, by the Bradford Waterworks Act, 1854 (17 & 18 Vict. c. cxxiv. s. 51), the waterworks company were empowered to take the water of certain streams, but it was enacted that they should not take those flowing into the Harden Beck without the assent of the millowners on that beck, until it had been certified by justices that a reservoir, called Doe Park Reservoir, had been completed and filled with water, and of a given capacity; the company being required to give ten days notice to the millowners before applying for the certificate, to the intent that they might oppose the granting of it. By an act of the same session (17 & 18 Vict. c. cxxix. s. 12), the municipal corporation of Bradford were empowered to purchase the Bradford waterworks for the benefit of the borough, and they did so. Afterwards (in January, 1865) the municipal corporation duly gave notice of their intention to apply for the certificate of justices; it was opposed, but the justices, after hearing evidence and making an elaborate inquiry, decided in favour of the corporation, and granted their certificate. A rule was obtained for a *certiorari* to bring up this certificate to be quashed, on the ground that the justices who granted it were interested. All the objections were disposed of during the argument except the following. On the affidavits on both sides it appeared that a hospital and a friendly society had invested part of their funds in bonds of the Bradford corporation, charging the borough fund, and that these bonds were taken in the names of trustees, and that two of the justices in question were, one of them amongst the trustees of the society, and the other amongst the trustees of the hospital. Neither of them had, nor by any possibility could have, any pecuniary beneficial interest in these bonds, but no doubt the security of their *cestui qui trusts* would be improved by anything improving the borough fund, and anything improving the waterworks, after they became the property of the corporation, would produce that effect.

The question which we have to determine, was whether this disqualifies the justices from acting in what was certainly a judicial inquiry: and we think it does not. There is no doubt that any

direct pecuniary interest, however small, in the subject of inquiry, does disqualify a person from acting as a judge in the matter; and if by any possibility these gentlemen, though mere trustees, could have been liable to costs, or to other pecuniary loss or gain, in consequence of their being so, we should think the question different from what it is: for that might be held an interest. But the only way in which the facts could affect their impartiality, would be that they might have a tendency to favour those for whom they were trustees; and that is an objection not in the nature of interest, but of a challenge to the favour. Wherever there is a real likelihood that the judge would, from kindred or any other cause, have a bias in favour of one of the parties, it would be very wrong in him to act; and we are not to be understood to say, that where there is a real bias of this sort this Court would not interfere; but in the present case there is no ground for doubting that the justices acted perfectly *bond fide*; and the only question is, whether in strict law, under such circumstances, the certificate of such justices is void, as it would be if they had a pecuniary interest; and we think that *Reg. v. Dean of Rochester*, (1851) 17 Q. B. 1; 20 L. J. (Q. B.) 467, is an authority, that circumstances, from which a suspicion of favour may arise, do not produce the same effect as a pecuniary interest. And as the decision in that case was on demurrer to a plea, and might have been taken into error, the authority is one on which we ought to act.¹

We think, therefore, that the rule ought to be discharged.

Rule discharged.

COOPER v. THE WANDSWORTH BOARD OF WORKS, (1869)

14 C. B. (N.S.) 180

COMMON PLEAS

ERLE C.J.—I am of opinion that this rule ought to be discharged. This was an action of trespass by the plaintiff against the Wandsworth district board, for pulling down and demolishing his house; and the ground of defence that has been put forward by the defendants has been under the 76th section of the Metropolis Local Management Act, 18 & 19 Vict. c. 120. By the part of that section which applies to this case, it is enacted that, before any person

¹ See also *Dimes v. Grand Junction Canal (Proprietors of)*, (1852) 3 H. L. C. 759, where a decree of Lord Cottenham was set aside on the ground of interest.

shall begin to build a new house, he shall give seven days' notice to the district board of his intention to build; and it provides at the end that, in default of such notice it shall be lawful for the district board to demolish the house. The district board here say that no notice was given by the plaintiff of his intention to build the house in question, wherefore they demolished it. The contention on the part of the plaintiff has been that, although the words of the statute, taken in their literal sense, without any qualification at all, would create a justification for the act which the district board has done, the powers granted by that statute are subject to a qualification which has been repeatedly recognized, that no man is to be deprived of his property without his having an opportunity of being heard. The evidence here shews that the plaintiff and the district board had not been quite on amicable terms. Be that as it may, the district board say that no notice was given, and that consequently they had a right to proceed to demolish the house without delay, and without notice to the party whose house was to be pulled down, and without giving him an opportunity of shewing any reason why the board should delay. I think that the power which is granted by the 76th section is subject to the qualification suggested. It is a power carrying with it enormous consequences. The house in question was built only to a certain extent. But the power claimed would apply to a complete house. It would apply to a house of any value, and completed to any extent; and it seems to me to be a power which may be exercised most perniciously, and that the limitation which we are going to put upon it is one which ought, according to the decided cases, to be put upon it, and one which is required by a due consideration for the public interest. I think the board ought to have given notice to the plaintiff, and to have allowed him to be heard. The default in sending notice to the board of the intention to build, is a default which may be explained. There may be a great many excuses for the apparent default. The party may have intended to conform to the law. He may have actually conformed to all the regulations which they would wish to impose, though by accident his notice may have miscarried; and, under those circumstances, if he explained how it stood, the proceeding to demolish, merely because they had ill-will against the party, is a power that the legislature never intended to confer. I cannot conceive any harm that could happen to the district board from

hearing the party before they subjected him to a loss so serious as the demolition of his house; but I can conceive a great many advantages which might arise in the way of public order, in the way of doing substantial justice, and in the way of fulfilling the purpose of the statute, by the restriction which we put upon them, that they should hear the party before they inflict upon him such a heavy loss. I fully agree that the legislature intended to give the district board very large powers indeed: but the qualification I speak of is one which has been recognized to the full extent. It has been said that the principle that no man shall be deprived of his property without an opportunity of being heard, is limited to a judicial proceeding, and that a district board ordering a house to be pulled down cannot be said to be doing a judicial act. I do not quite agree with that; neither do I undertake to rest my judgment solely upon the ground that the district board is a court exercising judicial discretion upon the point: but the law, I think, has been applied to many exercises of power which in common understanding would not be at all more a judicial proceeding than would be the act of the district board in ordering a house to be pulled down. The case of the corporation of the University of Cambridge, who turned out Dr. Bentley, in the exercise of their assumed power of depriving a member of the University of his rights, and a number of other cases which are collected in *The Hammersmith Rent-Charge case*, (1849) 4 Exch. 96, in the judgment of Parke B., shew that the principle has been very widely applied. The district board must do the thing legally; there must be a resolution; and, if there be a board, and a resolution of that board, I have not heard a word to shew that it would not be salutary that they should hear the man who is to suffer from their judgment before they proceed to make the order under which they attempt to justify their act. It is said that an appeal from the district board to the metropolitan board (under s. 211) would be the mode of redress. But, if the district board have the power to do what is here stated, I am not at all clear that there would be a right of redress in that way. The metropolitan board may not have a right to give redress for that which was done under the provisions of the statute. I think the appeal clause would evidently indicate that many exercises of the power of a district board would be in the nature of judicial proceedings; because, certainly when they are appealed from, the appellant and the respondent are to be

heard as parties, and the matter is to be decided at least according to judicial forms. I take that to be a principle of very wide application, and applicable to the present case; and I think this board was not justified under the statute, because they have not qualified themselves for the exercise of their power by hearing the party to be affected by their decision.

BYLES J.—... It seems to me that the board are wrong whether they acted judicially or ministerially. I conceive they acted judicially, because they had to determine the offence, and they had to apportion the punishment as well as the remedy. That being so, a long course of decisions, beginning with *Dr. Bentley's case* (*The King v. The Chancellor, &c., of Cambridge*, (1728) 1 Stra. 557, 2 Ld. Raym. 1334, 8 Mod. 148, Fortescue, 202), and ending with some very recent cases, establish that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature. The judgment of Mr. Justice Fortescue, in *Dr. Bentley's case*, is somewhat quaint, but it is very applicable, and has been the law from that time to the present. He says, 'The objection for want of notice can never be got over. The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man, upon such an occasion, that even God himself did not pass sentence upon Adam before he was called upon to make his defence. "Adam" (says God), "where art thou? Hast thou not eaten of the tree whereof I commanded thee that thou shouldest not eat?" And the same question was put to Eve also.' If, therefore, the board acted judicially, although there are no words in the statute to that effect, it is plain they acted wrongly. But suppose they acted ministerially,—then it may be they were not bound to give the first sort of notice, viz. the notice of the hearing; but they were clearly bound, as it seems to me, by the words of the statute, to give notice of their order before they proceeded to execute it.

WILLES, BYLES, and KEATING JJ. delivered concurring judgments.

Rule discharged.

Note.—The point never seems to have been taken by counsel, that the defendants could not be made liable to an action without proof of malice in respect of a judicial or quasi-judicial act.

REG. v. BOTELEK, (1864) 4 B. & S. 959

QUEEN'S BENCH

Nash, an extra-parochial place, having, by stat. 20 Vict. c. 19, s. 1, become a parish, and by an order of the Poor Law Board added to a Union, a contribution order was made by the guardians of the Union upon Carne, the overseer. Upon his refusal to pay, the guardians applied to justices for a summons under stat. 2 & 3 Vict. c. 84, s. 1, which empowers them, if they 'shall think fit,' to issue their warrant for levying the amount. At the hearing, the only ground which Carne urged against the issuing of the warrant was, that, as the parish of Nash had not at that time any paupers chargeable to it, it was unjust and unreasonable that the rate-payers thereof should be called upon to pay anything towards the expenses of the Union. The justices refused to issue their warrant, adding that they did so in the exercise of their discretion.

The guardians obtained a rule nisi ordering the justices to show cause why they should not issue their warrant.

COCKBURN C.J.—I do not intend in the slightest degree to encroach upon the doctrine that, where magistrates have a discretionary power to decide whether they will do an act or not, this Court will not order them to do it when they have exercised their discretion upon the merits of the matter. But it is clear, upon the facts of the present case, that they have not exercised that discretion which in law they would have been justified in exercising. This extra-parochial place, having been made part of a Union, became liable by law to contribute its share to the general expenses of the Union; and the magistrates, having that fact established before them, ought to have issued their warrant. It is equally clear that the reason why they did not do so was because they were invited to exercise their discretion on a matter which was not within it. They proceeded upon the ground that the annexation of this extra-parochial place to the Union was unjust, in other words, that the operation of the Act of Parliament under which that was effected was unjust. Their decision virtually amounts to this,—'We know that upon all other grounds we ought to issue our warrant, but we will take upon ourselves to say that the law is unjust, and therefore we will not issue it.' That is not a tenable ground on which this Court can allow magistrates to decline to exercise their discretion according to law. It would be an evil

example if we held that they might thus arbitrarily and illegally exercise their discretion; and therefore this rule must be made absolute, with costs.

BLACKBURN and MELLOR JJ. delivered concurring judgments.
Rule absolute.

LOCAL GOVERNMENT BOARD v. ARLIDGE, [1915] A. C. 120

HOUSE OF LORDS

VISCOUNT HALDANE L.C.—My Lords, the question which has to be decided in this case is whether the appellants, the Local Government Board, have validly dealt with an appeal brought before them under the provisions of s. 17 of the Housing and Town Planning Act, 1909. The respondent is the assignee of a lease of a dwelling-house, No. 88, Palmerston Road, in the metropolitan borough of Hampstead. On January 12, 1911, the borough council made an order under s. 17, sub-s. 2, of the Act to which I have referred, prohibiting the use of the house for habitation until in their judgment it had been rendered fit for that purpose. On March 7, 1911, the respondent gave notice of appeal to the Local Government Board. That Board intimated, in accordance with s. 39 of the Act and with the rules which it had made thereunder, that it would not decide the appeal without having held a local inquiry. A public inquiry was, as the result, held on May 24, 1911, before Mr. Edward Leonard, one of the housing inspectors of the Board designated for that purpose, who also made a personal inspection of the house on June 2 following. The respondent had furnished the Board with copies of reports of certain experts whom he had consulted, such reports being to the effect that the house was perfectly habitable, and that there was no justification for the closing order. The respondent had intimated that he should decline to attend the inquiry, and he did not appear or tender evidence. On June 6 the inspector submitted to the Board his report of the inspection, and on July 29, 1911, the Board, after considering the report and the other documents before them, confirmed the closing order. On August 11 the respondent applied to the Board to state a special case under s. 39, sub-s. 1 (a), of the Act for the opinion of the High Court, raising the point that the order of July 29 was invalid, because (a) the report of the inspector had been treated as a confidential document and had not been

disclosed to the respondent, and (b) because the Board had declined to give the respondent an opportunity of being heard orally by the person or persons by whom the appeal was finally decided, in addition to the opportunity which he had had of stating and arguing his case before the inspector. The Board declined to state a case, and the respondent did not, as he could have done under the Act, apply to the High Court for an order calling on the Board to state it.

My Lords, in the meantime the respondent applied to the borough council to determine the closing order having regard to repairs which he had effected, and on October 5, 1911, the council refused on the ground that the premises had not been rendered by such repairs fit for habitation. On October 19 the respondent appealed again to the Board, this time against the refusal to determine the closing order. I pass over certain communications and proceedings relating to the technical points taken by the respondent, inasmuch as these have ceased to be of importance, and I come to November 25, 1911. On this date the Board gave notice to the respondent of their intention to hold a second public local inquiry with respect to his appeal against the refusal of the borough council to determine the closing order. The inquiry was held on December 8 before the same inspector. The respondent was present with his solicitor and witnesses, and the borough council and the London County Council were also represented. The respondent's solicitor argued his case, and the respondent and his witnesses gave evidence. On December 13 the inspector submitted to the Board his report, together with a shorthand note of the evidence and speeches. On January 8, 1912, the Board intimated to the respondent that it would be willing to consider any further statement in writing which he desired to submit to it. The respondent did not avail himself of this opportunity, but applied for writ of certiorari to remove the order of the Board into the King's Bench Division to be quashed, on the ground that the appeal had not been determined in the manner provided by the law. The points taken were that the appeal had been decided neither by the Board nor by any one lawfully authorized to act for them, and that the procedure adopted by the Board was contrary to natural justice in that the respondent had not been afforded an opportunity of being heard orally before the Board. I assume further, what appears to have been the case, that the

point was also taken that the report of the inspector on the second inquiry was not disclosed to the respondent. This point was certainly afterwards argued in the Court of Appeal.

The case was heard before Ridley, Coleridge, and Banks JJ. Among the affidavits which they had before them was one by Sir Horace Monro, the Permanent Secretary of the Board, who stated that the decision was come to after full and careful consideration of the reports made by the inspector, and of the evidence and documents, including the observations and objections put forward in the correspondence by the respondent's solicitors. He referred to the invitation already mentioned, addressed by the Board to the respondent's solicitors, to place before it in writing any further statement the respondent might desire it to consider. He said that the appeal had been determined judicially on the report of the inspector, and the evidence taken by him, (although without any oral hearing of the respondent beyond that of the inquiry) in the same manner in all respects as it had been customary as regards other appeals to the Board. He referred to a formal order of the Board, signed by the President, and by the assistant secretary, dismissing the appeal.

On these facts the learned judges of the King's Bench Division declined to hold that the appeal had not been properly disposed of, both in form and in substance. They considered that the statute and the rules made under it, to which I will presently refer, provided for a public local inquiry at which any party interested might appear and state his case orally, and that it was not intended that there should be a subsequent hearing before the Board analogous to that before a Court of law. They thought that there was nothing contrary to natural justice in such procedure.

The Court of Appeal, consisting of Vaughan Williams, Buckley, and Hamilton L.JJ., by a majority took a different view and reversed the decision. Vaughan Williams L.J. held that the appeal was one *inter partes*, the respondent and the Hampstead Local Board being the opposing parties. He thought that the duty of the Board was to hear both sides, and to disclose all the evidence of fact placed before them, and the conclusions of law adopted by them as the basis of their decision. He held that the non-production to the respondent of the inspector's reports was contrary to the principles of natural justice, and that, in the absence

of a plain direction in the statute abrogating the necessity of observing these principles in dealing with the reports, the principles of English justice had been violated. He appeared further to think that the absence of any statement by or on behalf of the Board as to which of its members considered the appeal was a further objection to the validity of the Board's order.

Buckley L.J. thought the importance of the general question which was raised very great. It was increasingly common for statutes to empower Government departments to decide questions affecting rights of property, and it was of the first importance that their proceedings should be so conducted as to command the confidence of the public, and that the principles applicable in their conduct should be well understood. A mere power to make rules determining the procedure in such appeals did not obviate the necessity of such rules being in accordance with natural justice. It was essential that each of the parties should know the case the other made and should be heard in the other's presence. Assuming that it could be validly provided that the original hearing should assume the form of a statement in writing, it was not clear that a party who subsequently desired to be heard orally could be debarred from claiming to be so heard.

The learned Lord Justice thought that as the local authority was the authority against which the appeal to the Board was brought, it was in one sense not a party litigant, but, as it could be ordered to make a counter-statement and to pay or receive costs, for all material purposes it was not to be distinguished from a party litigant, and therefore the other party ought to know the case it made. Having regard to the terms of s. 5 of 84 & 85 Vict. c. 70, which constituted the Board and provided that anything to be done on its behalf might be done by the President or any member, or by a secretary or assistant secretary authorized by its General Order, the inspector was not within the class of persons who could decide anything. If he made a report on a public inquiry held by him it should be made public. A case could not be argued before one man and decided by another. The respondent had therefore no real opportunity of presenting his case when he was invited by the letter of January 8, 1912, to do so, for he was not permitted to see the report.

Hamilton L.J. was of a different opinion. The practice, he said, of the Board, like that of its predecessor the Poor Law Board,

had always been to dispose by correspondence of appeals even in important matters such as an auditor's disallowance of items, and in treating the inspector's report as confidential it was only following an old and well-known practice. The question was whether, if the statute itself did not in terms authorize the practice, it was contrary to natural justice, 'an expression sadly lacking in precision.' He referred to several precedents, and came to the conclusion that it was a sound inference, to be drawn as matter of construction, that the Legislature, aware, as he took it to have been, of the practice as to these inquiries and its incidents, intended that the local inquiry which it prescribed should be the usual local inquiry, and that the usual incidents should attach in default of any special enactment, including the incident that the Board should treat the report as confidential. He was of opinion that what had been done was in accordance with the Act of 1909.

My Lords, I have thought it important to set out with some fulness the conflicting views in the Court of Appeal. It is obvious that two of the judges there based their conclusions on the principle that in the absence of a direction to the contrary, which they could not find in the statute, the analogy of the procedure in a Court of justice must guide them. Hamilton L.J., on the contrary, thought that he found in the statute a scheme of procedure that excluded this analogy. Which of these opinions was right can only be determined by referring to the language of the Legislature. Here, as in other cases, we have simply to construe that language and to abstain from guessing at what Parliament had in its mind, excepting so far as the language enables us to do so. There is no doubt that the question is one affecting property and the liberty of a man to do what he chooses with what is his own. Such rights are not to be affected unless Parliament has said so. But Parliament, in what it considers higher interests than those of the individual, has so often interfered with such rights on other occasions, that it is dangerous for judges to lay much stress on what a hundred years ago would have been a presumption considerably stronger than it is to-day. I therefore turn to the Acts of Parliament which are relevant with the sense that there is little justification for looking in advance for the embodiment of one scheme as more probable than the embodiment of another.

The closing of dwelling-houses as being dangerous or injurious to health, or unfit for habitation, is no new jurisdiction. The

Housing of the Working Classes Act, 1890, gave to the local authority the power to take proceedings to enforce penalties and closing orders before Courts of summary jurisdiction, to be followed, in certain circumstances, by demolition orders. Under that Act the owner of the house had an appeal to quarter sessions. This power of closing was somewhat extended by the Housing of the Working Classes Act, 1903, but the principle of the application being to a Court of justice remained the same. A change of this principle was introduced in the Housing and Town Planning Act, 1909. The local authority was empowered itself to make the closing order, certain conditions having been complied with, and it was given power to determine the closing order if satisfied that the house in respect of which the order had been made had subsequently been rendered fit for habitation. In respect of both a closing order and a determining order the owner was given a right of appeal. But the appeal was to be, not as before to quarter sessions, but to the Local Government Board. Stringent powers of inspection were given to both the local authority and the Local Government Board. In the case of an appeal, the procedure as to everything, including costs, was to be such as the Board might by rules determine. The Board was to have power to make such order on any appeal as it should think equitable. It could state a case, but only on a question of law, for the opinion of the High Court, and could be compelled by the High Court to do so. The rules were to provide that the Board should not dismiss any appeal without having first held a public local inquiry. In the application of the Act to Scotland, the sheriff was to be substituted for the Local Government Board. This provision, however, although relied on in the argument before us, throws but little light on the question as to the character of the jurisdiction created by the Act, for, as is matter of common knowledge, the sheriff in Scotland is an administrative as well as a judicial officer, and the Local Government Board in Scotland is, on the other hand, only one of the subordinate departments under the Secretary for Scotland.

My Lords, it is obvious that the Act of 1909 introduced a change of policy. The jurisdiction, both as regards original applications and as regards appeals, was in England transferred from Courts of justice to the local authority and the Local Government Board, both of them administrative bodies, and it is necessary to consider what consequences this change of policy imported.

My Lords, when the duty of deciding an appeal is imposed, those whose duty it is to decide it must act judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same. In the case of a Court of law tradition in this country has prescribed certain principles to which in the main the procedure must conform. But what that procedure is to be in detail must depend on the nature of the tribunal. In modern times it has become increasingly common for Parliament to give an appeal in matters which really pertain to administration, rather than to the exercise of the judicial functions of an ordinary Court, to authorities whose functions are administrative and not in the ordinary sense judicial. Such a body as the Local Government Board has the duty of enforcing obligations on the individual which are imposed in the interests of the community. Its character is that of an organization with executive functions. In this it resembles other great departments of the State. When, therefore, Parliament entrusts it with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow the procedure which is its own, and is necessary if it is to be capable of doing its work efficiently. I agree with the view expressed in an analogous case by my noble and learned friend Lord Loreburn. In *Board of Education v. Rice*, [1911] A. C. 179, he laid down that, in disposing of a question which was the subject of an appeal to it, the Board of Education was under a duty to act in good faith, and to listen fairly to both sides, inasmuch as that was a duty which lay on every one who decided anything. But he went on to say that he did not think it was bound to treat such a question as though it were a trial. The Board had no power to administer an oath, and need not examine witnesses. It could, he thought, obtain information in any way it thought best, always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view. If the Board failed in this duty, its order might be the subject of certiorari and it must itself be the subject of mandamus.

My Lords, I concur in this view of the position of an administra-

tive body to which the decision of a question in dispute between parties has been entrusted. The result of its inquiry must, as I have said, be taken, in the absence of directions in the statute to the contrary, to be intended to be reached by its ordinary procedure. In the case of the Local Government Board it is not doubtful what this procedure is. The Minister at the head of the Board is directly responsible to Parliament like other Ministers. He is responsible not only for what he himself does but for all that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency. Unlike a judge in a Court he is not only at liberty but is compelled to rely on the assistance of his staff. When, therefore, the Board is directed to dispose of an appeal, that does not mean that any particular official of the Board is to dispose of it. This point is not, in my opinion, touched by s. 5 of 33 & 34 Vict. c. 70, the Act constituting the Local Government Board to which I have already referred. Provided the work is done judicially and fairly in the sense indicated by Lord Loreburn, the only authority that can review what has been done is the Parliament to which the Minister in charge is responsible. The practice of the department in the present case was, I think, sufficiently shown by Sir Horace Monro's affidavit to have been followed. In accordance with that practice the Board, in order to obtain materials with which to decide, appointed one of its health inspectors to hold a public inquiry. This was in accordance with the rules it had made under the section of the statute which I have quoted and with its usual practice. It is said that the report of the inspector should have been disclosed. It might or might not have been useful to disclose this report, but I do not think that the Board was bound to do so, any more than it would have been bound to disclose all the minutes made on the papers in the office before a decision was come to. It is plain from Sir Horace Monro's affidavit that the order made was the order of the Board, and so long as the Board followed a procedure which was usual, and not calculated to violate the tests to which I have already referred, I think that the Board was dis-

charging the duty imposed on it in the fashion Parliament must be taken to have contemplated when it deliberately transferred the jurisdiction, first, from a Court of summary jurisdiction to the local authority, and then, for the purposes of all appeals, from quarter sessions to an administrative department of the State. What appears to me to have been the fallacy of the judgment of the majority in the Court of Appeal is that it begs the question at the beginning by setting up the test of the procedure of a Court of justice, instead of the other standard which was laid down for such cases in *Board of Education v. Rice*. I do not think the Board was bound to hear the respondent orally, provided it gave him the opportunities he actually had. Moreover, I doubt whether it is correct to speak of the case as a *lis inter partes*. The Hampstead Borough Council was itself acting administratively, although it had the right to appear, and did appear, before the inspector and on the appeal, and might have to pay or receive costs.

For the reasons I have given, I have arrived at the conclusion that the judgments of the Divisional Court and of Hamilton L.J. in the Court of Appeal were right, and that this appeal should be allowed with costs here and in the Court of Appeal, and that the order of the Divisional Court should be restored.

LORDS SHAW OF DUNFERMLINE, PARMOOR and MOULTON delivered judgments to the same effect.

Order of the Court of Appeal reversed and order of the King's Bench Division restored.

ROYAL AQUARIUM AND SUMMER AND WINTER GARDEN SOCIETY
LIMITED v. PARKINSON, [1892] 1 Q. B. 481

COURT OF APPEAL

This was an appeal from the decision of Hawkins J. sitting with a jury. The defendant, a member of the London County Council, had at a meeting of the Council opposed the application of the plaintiffs for the renewal of their licence for music and dancing, and in so doing had uttered certain words defamatory of the plaintiffs. On being sued for damages he did not attempt to justify the slander but pleaded that the occasion on which the words were spoken was absolutely privileged, or in the alternative, that the words were spoken without malice upon an occasion of qualified privilege. He also alleged that he was entitled to notice of action,

by reason of the combined effect of the Local Government Act, 1888, and 11 & 12 Vict. c. 44, and no such notice was given.

The jury found that the defendant had spoken maliciously and awarded the plaintiffs £250 damages, and the learned judge on that verdict gave judgment for the plaintiffs.

[LORD ESHER delivered judgment dismissing the appeal.]

FRY L.J.—I am of the same opinion. Several arguments have been adduced to us in support of this application. The argument most forcibly pressed upon us was that the defendant was entitled to absolute immunity from action for anything done by him while performing his duty as a member of the county council, in dealing with applications for licences for music and dancing. I will deal with this point first. I must assume, for that purpose, that the defendant made the defamatory statement complained of falsely and maliciously and with knowledge of its falsity. I will first inquire what the law with regard to immunity is in cases of this description, and then proceed to consider the nature of the duty cast upon the defendant. The largest statement of this immunity is that contained in the judgment of the Exchequer Chamber in *Dawkins v. Lord Rokeby*, (1873) L. R. 8 Q. B. 255, where it is said that 'the authorities are clear, uniform, and conclusive that no action of libel or slander lies, whether against judges, counsel, witnesses, or parties, for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law.' I accept that proposition with this qualification. I doubt whether the word 'tribunal' does not really rather embarrass the matter; because that word has not, like the word 'court,' an ascertainable meaning in English law. Moreover, the judgment of the Exchequer Chamber appears to me to proceed upon the hypothesis that the word is really equivalent to the word 'court,' because it proceeds to inquire into the nature of the particular Court there in question, and comes to the conclusion that a military Court of inquiry, 'though not a Court of record, nor a Court of law, nor coming within the ordinary definition of a Court of justice, is nevertheless a Court duly and legally constituted and recognised in the articles of war and many Acts of Parliament.' I do not desire to attempt any definition of a 'court.' It is obvious that, according to our law, a court may perform various functions. Parliament is a court. Its duties as a whole are deliberative and legislative: the duties of a part of it only are judicial. It is never-

theless a court. There are many other courts which, though not Courts of justice, are nevertheless courts according to our law. There are, for instance, courts of investigation, like the coroner's court. In my judgment, therefore, the existence of the immunity claimed does not depend upon the question whether the subject-matter of consideration is a Court of Justice, but whether it is a Court in law. Wherever you find a Court in law, to that the law attaches certain privileges, among which is the immunity in question.

But this argument was used on behalf of the defendant. It was said that the existence of this immunity is based on considerations of public policy, and that, as a matter of public policy, wherever a body has to decide questions, and in so doing has to act judicially, it must be held that there is a judicial proceeding to which this immunity ought to attach. It seems to me that the sense in which the word 'judicial' is used in that argument is this: it is used as meaning that the proceedings are such as ought to be conducted with the fairness and impartiality which characterize proceedings in Courts of justice, and are proper to the functions of a judge, not that the members of the supposed body are members of a Court. Consider to what lengths the doctrine would extend, if this immunity were applied to every body which is bound to decide judicially in the sense of deciding fairly and impartially. It would apply to assessment committees, boards of guardians, to the Inns of Court when considering the conduct of one of their members, to the General Medical Council when considering questions affecting the position of a medical man, and to all arbitrators. Is it necessary, on grounds of public policy, that the doctrine of immunity should be carried as far as this? I say not. I say that there is ample protection afforded in such cases by the ordinary law of privilege. I find no necessity or propriety in carrying the doctrine so far as this argument requires. It is to be borne in mind that there is a great difference between the constitution of bodies of the kind to which I have referred and most Courts. Courts are, for the most part, controlled and presided over by some person selected as specially qualified for the purpose; and they have generally a fixed and dignified course of procedure, which tends to minimise the risks that might flow from this absolute immunity. These considerations do not apply to bodies such as I have mentioned. Furthermore, there is no precedent for extending

this immunity to all bodies which are bound to decide matters 'judicially,' in the sense in which this argument uses the term. One observation I wish to make here, in order to prevent what I have said from being misunderstood. I have spoken of the immunity as applying to 'Courts.' I do not wish anything I have said to be taken as expressing a doubt that there are matters done by a member of a Court in a judicial capacity as to which, though done in his private room and not in open Court, this immunity may exist. No question arises here as to such a case, and I only refer to it to prevent being misunderstood.

The question then arises, whether the county council, when hearing applications for licences, were acting as a Court, and whether the defendant on that occasion was acting as a judge or member of that Court. The character in which the council acted turns, in the first place, on the language of the statute 25 Geo. 2, c. 36. The 2nd section of that Act provides for the granting by the quarter sessions of such licences for dancing and music, &c., as they in their discretion shall think proper. That enactment appears to me to confer on the justices an administrative duty or power. I find in the Act no words prescribing any particular mode of procedure, or requiring them to hear and determine. I find, on the contrary, that certain things subsequent to the granting of the licence are to be done in open court. The licence is to be sealed by the justices in open court, and it is to be read by the clerk of the peace publicly in court. These provisions appear to me to be applicable to a proceeding which may take place in the magistrates' private room, but the result of which is afterwards to be made public in open court. The nature of the discretion given and the language of the Act appear to me to shew that the proceeding is administrative, not judicial. We were pressed with the words 'in their discretion,' used in the statute. It was argued that these words imported a judicial discretion. But it is not every discretion that is judicial. The magistrates are clothed in many cases with a discretion that is not judicial. The first statute that deals with the county rate (12 Geo. 2, c. 29, s. 1) says that the justices shall have power to make a rate for such sums or sum of money as they in their discretion shall think fit; but it could not be contended that that discretion is judicial. There is nothing in the section which makes the proceeding that of a Court, though it has to be done discreetly. Then comes the question, whether

there is anything in the Local Government Act, 1888, to alter the nature of the proceeding in this respect. I come to the conclusion that there is not. It is clear from the language of the Act that it was intended to draw a broad line between the administrative and judicial functions of the justices, and to transfer the former to the county council, while leaving the latter in the hands of the justices. Sect. 8 provides that there shall be transferred to the county council the administrative business of the justices of the county in quarter sessions assembled—that is to say, all business done by the quarter sessions, or a committee appointed by the quarter sessions, in respect of the several matters following; and these include, by sub-s. 5, the licensing, under any general Act, of houses and other places for music and dancing. But the matter does not rest there. For s. 78, sub-s. 2, shews the intention to have been to exclude from the transfer of the magistrates' duties to the county council all judicial duties. That section provides in sub-s. 2 that the transfer of powers and duties enacted by the Act shall not authorize any county council to exercise any jurisdiction under the Summary Jurisdiction Acts, or to perform any judicial business, or otherwise act as justices or a justice of the peace. The statute, therefore, so far from giving any new colour to the suggestion made on behalf of the defendant, leaves the matter precisely where it was before. I, therefore, come to the conclusion that the body to which the statements complained of were made was not a Court, and that those statements are not entitled to the immunity claimed for them.

Then comes the question as to notice of action. That turns on the language of statute 11 & 12 Vict. c. 44, ss. 8, 9. The words there used are: 'No action shall be brought against any justice of the peace for anything done by him in the execution of his office,' &c. In my opinion, words spoken are not 'anything done' within that language.

The only remaining question is, whether there was any evidence for the jury of express malice which would prevent the application of privilege. The figures referred to were produced before the jury, and evidence was given of their identity with those of which the defendant spoke. There was evidence as to the dresses they wore and the nature of the performance. That evidence was such as might lead the jury to suppose that the defendant could not have been honestly mistaken as to what he saw. I express no opinion

as to whether I should have arrived at the same conclusion as the jury. It seems to me to be sufficient to say that there was evidence for them. Therefore, this application fails on all the grounds which have been put forward.

With regard to *Akkersdyk's Case*, [1892] 1 Q. B. 190, that case proceeded on the view that the county council were bound to act judicially in the sense which I have already explained—viz., that they were bound to act fairly and impartially. It is not fair that the same person should act as accuser and also as judge. That case did not decide that the county council was a Court.

[LOPES L.J. delivered a concurring judgment.]

Application dismissed.

Extract from

THE CASE OF THE MARSHALSEA, (1618) 10 Co. Rep. 76a

It was resolved, that the action well lies against the defendants: and a difference was taken when a Court has jurisdiction of the cause, and proceeds *inverso ordine* or erroneously, there the party who sues, or the officer or minister of the Court who executes the precept or process of the Court, no action lies against them. But when the Court has not jurisdiction of the cause, there the whole proceeding is *coram non judice*, and actions will lie against them without any regard of the precept or process, and therefore the said rule cited by the other side, *sc. Qui jussu judicis aliquod fecerit* (but when he has no jurisdiction, *non est judex*) *non videtur dolo malo fecisse, quia parere necesse est*, was well allowed, but it is not of necessity to obey him who is not Judge of the cause, no more than it is a mere stranger, for the rule is, *judicium a non suo judice datum nullius est momenti*. And that fully appears in our books; and therefore in the case betwixt Bowser and Collins in 22 E. 4. 38. b. there Pigot says, if the Court has not power and authority, then their proceeding is *coram non judice*: as if the Court of Common Pleas holds plea in an appeal of death, robbery, or any other appeal, and the defendant is attainted, it is *coram non judice quod omnes concesserunt*. But if the Court of Common Pleas in a plea of debt awards a *capias* against a duke, earl, &c. which by the law doth not lie against them, and that appears in the writ itself; and if the sheriff arrests them by force of the

capias, although the writ be against law, notwithstanding, inasmuch as the Court has jurisdiction of the cause, the sheriff is excused: and therewith agrees 38 H. 8. Dy. 60. b. The same law, if a justice of peace makes a warrant to arrest one for felony who is not indicted although the justice errs in making the warrant, yet he who makes the arrest by force of that warrant, shall not be punished by writ of false imprisonment, because he is Judge of the cause; and therewith agrees 14 H. 8 16. a.

PUBLIC AUTHORITIES PROTECTION ACT, (1893) 56 & 57
Vict. c. 61.

1. Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:

- (a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof:
- (b) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client:
- (c) Where the proceeding is an action for damages, tender of amends before the action was commenced may, in lieu of or in addition to any other plea, be pleaded. If the action was commenced after the tender, or is proceeded with after payment into court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant shall be entitled to costs, to be taxed as between solicitor and client, as from the time of the tender or payment; but this provision shall not affect costs on any injunction in the action:

suit or action can be brought against the King, even in civil matters, because no Court can have jurisdiction over him. For all jurisdiction implies superiority of power; authority to try would be vain and idle without an authority to redress, and the sentence of a Court would be contemptible unless the Court had power to command the execution of it, but who shall command the King?"'

But it is obvious that very serious injustice would be caused if there was no way of making the Crown liable in any circumstances. There is in fact a remedy known as a Petition of Right, proceedings in which are now regulated by the Petitions of Right Act, 1860 (p. 229 below). The older common law procedure, though expressly preserved by the Act, is now never employed. There is no material difference between a Petition of Right and an ordinary action, except that no trial can take place unless the Crown, by granting its *fiat*, 'Let right be done', submits to the jurisdiction of the Court. The Crown cannot be compelled by legal process, either directly, or indirectly through the Home Secretary, to grant its *fiat*. This was decided in *Irwin v. Grey*, (1862) 3 F. & F. 635. Dicey in his appendix on proceedings against the Crown says that the *fiat* is never refused. This is far too strong; we have the word of Rowlatt J., who was Junior Counsel to the Treasury, to the contrary (see *Bombay & Persia S.N. Co. v. MacLay*, p. 227 below). But it is improbable that there is much to complain of in this regard; it is not suggested that real injustice has been done. Bowen L.J. described the position accurately in *In re Nathan*, (1884) 12 Q. B. D. at p. 479,

'Everybody knows that that fiat is granted as a matter, I will not say, of right, but as a matter of invariable grace by the Crown whenever there is a shadow of claim, nay, more, it is the constitutional duty of the Attorney-General not to advise a refusal of the fiat unless the claim is frivolous.'

It is when we consider the incidental advantages of the Crown and the limitations of the remedy that we find difficulties. The importance of the Crown's incidental advantages, which are numerous, may be illustrated from the practice with regard to documents. In an action between subject and subject, each party can demand that the other shall disclose, with certain well-defined exceptions, all documents relating to the matter in issue. This disclosure is called discovery. But the law is that the Crown is entitled to full discovery, and that the subject as against the Crown

is not. No doubt in practice the subject is more fairly treated; the Crown does usually disclose all relevant documents in its possession unless there is some overriding reason of public policy which forbids the disclosure. Yet the Crown has an absolute discretion in the matter.¹

The scope of the remedy has always been limited by the rule that the Crown cannot be made liable in tort. That this is the only limitation has, however, not always been clear. In the Middle Ages petition of right was only one of a group of remedies available to the subject against the Crown. The others—*traverse of office* and *monstrans de droit*—were of very limited application, and are now obsolete. Petition of right was originally a proprietary remedy by which the subject recovered his property which had come into the possession of the Crown. But in the Middle Ages, the notion of property was singularly wide; it contained many rights which would now be regarded as arising out of contract. Thus, the grant of an annuity was regarded less as creating a contractual obligation for the periodical payment of money than as conferring a proprietary right. There was therefore no difficulty in extending the operation of petition of right to the recovery of an annuity, or indeed of any kind of liquidated (i.e. ascertained) debt. The action for unliquidated damages for breach of contract (i.e. damages to be ascertained in the course of the action) now the most frequent of all actions, is almost entirely a product of modern times. It was never in any sense of the term a proprietary action, for it is impossible to think of a person as having a property in an unascertained sum, and it originated in fact as an action in tort. It is therefore difficult to see how petition of right, in its origin a remedy which could be used for the recovery of property, and could not be used to obtain redress for a tort, was applicable to a case where a subject wished to recover unliquidated damages for a breach of contract committed by the Crown.

However, the action of debt ceased to be regarded as a semi-proprietary action and the contractual element in a debt came so much into the foreground that it began to be thought that the

¹ This wide and possibly vexatious prerogative should be clearly distinguished from the power of the Crown to stop the disclosure of any document on ground of public convenience, a power not limited to state papers but equally applicable to state papers and to mere business communications between private persons (see on this entire subject *Asiatic Petroleum Co. Ltd. v. Anglo-Persian Oil Co. Ltd.*, [1916] 1 K. B. 822).

rule that petition of right lay for the recovery of a debt was only part of a wider rule that it could be used to enforce any obligation arising out of a contract. This was the view of all the judges in the *Bankers' Case*, decided at the end of the seventeenth century, and after being assumed throughout the eighteenth century and the earlier part of the nineteenth, it was finally sanctioned in the great case of *Thomas v. Reg.* (p. 281 below).

Yet even so late as the case of *Feather v. Reg.*, (1865) 6 B. & S. 257, we find Cockburn C.J. cautiously enumerating the cases to which and to which alone petition of right was applicable. It was a great step forward when Palles C.B. in the Irish case of *Kildare County Council v. R.*, [1909] 2 I. R. 199, made his sweeping generalization:

'Upon a review of all the cases cited by the counsel for the Crown under this head of their argument, I am satisfied that the maxim that the King can do no wrong is at the root of the limitation of the subject-matter of a Petition of Right laid down in those cases; that the distinction is between claims arising, on the one hand, out of rightful acts, by which the Crown can be bound; and, on the other, claims arising out of wrongful acts, by which the Crown cannot be bound; and that, at common law, there is a remedy for every act done by the servants of the Sovereign, which, were he a common person, would render him liable to an action. If that act be one of wrong, it cannot be imputed to the Sovereign, although it were done by his express command; and the remedy is against the servant only. In every other case, I am prepared to hold that the remedy is by Petition of Right' (at p. 232).

That this generalization has been fully accepted by the House of Lords is clear from the following passages in *A.-G. v. De Keyser's Royal Hotel*, [1920] A. C. 508; see p. 325 below, where the claim was for compensation under the Defence Act, 1842, for premises requisitioned for war purposes by the Crown.

'The only remaining point is whether a Petition of Right will lie in respect of the statutory liability for an unliquidated amount, not a fixed sum. In my opinion, based on the authority of *Reg. v. Doutre*, (1884) 9 App. Cas. 745, and *Windsor, &c., Ry. Co. v. Reg.*, (1886) 11 App. Cas. 607, there is no valid distinction between a sum due under a contract or grant made by or on behalf of the Crown as mentioned by Erle C.J. in *Tobin v. Reg.*, (1864) 16 C. B. (N.S.) 310, and such a liability, due for the lawful and authorized use and enjoyment by the officer of the Sovereign, on the Sovereign's behalf,

of the lands or buildings of a subject. Both seem equally untainted by tort, both equally untouched by the principle that the King can do no wrong.' (Per Lord Atkinson, at p. 545.)

'The other point is as to the remedy. I am of opinion that a Petition of Right lies, for it will lie when in consequence of what has been legally done any resulting obligation emerges on behalf of the subject. The Petition of Right does no more and no less than to allow the subject in such cases to sue the Crown. It is otherwise when the obligation arises from tort, but, as already insisted on, what was done here, so far as the taking of the premises was concerned, was perfectly legal.' (Per Lord Dunedin, at p. 530.)

It must not, however, be supposed that it is always as easy to succeed in a petition of right, as in an ordinary action where the defendant is a subject. In particular, it is not unusual to find that a suppliant fails in a contractual claim, not through any procedural defect in the petition of right itself, but because he is unable to establish any right to redress. In *Dunn v. Reg.* (p. 241 below) the suppliant, who had been dismissed without notice before the end of his term of office, found it impossible to prove a breach of his contract of service with the Crown. As Lord Hobhouse said in delivering the opinion of the Privy Council in *Shenton v. Smith*, [1895] A. C. at pp. 234-5,

'Unless in special cases where it is otherwise provided, servants of the Crown hold their offices during the pleasure of the Crown; not by virtue of any special prerogative of the Crown, but because such are the terms of their engagement, as is well understood throughout the public service. If any public servant considers that he has been dismissed unjustly, his remedy is not by a law-suit, but by an appeal of an official or political kind. . . . The difficulty of dismissing servants whose continuance in office is detrimental to the State would, if it were necessary to prove some offence to the satisfaction of a jury, be such as seriously to impede the working of the public service.'

The position of soldiers and sailors was described by Lord Esher in still more emphatic terms.

'The law is as clear as it can be, and it has been laid down over and over again as the rule on this subject that all engagements between those in the military service of the Crown and the Crown are voluntary only on the part of the Crown, and give no occasion for an action in respect of any alleged contract.'—*Mitchell v. Reg.*, [1896] 1 Q. B. 121 n, at p. 122.

The tenure of government servants can indeed be altered by

statute, and in *Gould v. Stuart*, [1896] A. C. 575, the Privy Council held that the rule that civil servants may be dismissed at the pleasure of the Crown was overridden by the New South Wales Civil Service Act, 1884. But it seems that the position of a servant of the Crown cannot be made any better by the voluntary action of the Crown. This is but a particular application of the far-reaching rule laid down by Rowlatt J. in *Rederiaktiebolaget Amphitrite v. R.* (p. 242 below). The Crown suffers from a contractual disability, in that it cannot contract at all so as to fetter its future executive action.

Likewise, the Crown cannot without Parliamentary authorization contract unconditionally for a money payment. The fulfilment of any such contract must be dependent on the provision by Parliament of the requisite supplies, since no moneys can be withdrawn from the Consolidated Fund save under the authority of an Act of Parliament. The condition of parliamentary provision is usually notified to contractors by being included in the terms of their contract; but whether expressly stated or not, such a condition would certainly be held to be implied in any such contract. No doubt, the position of those who contract with the government is thus rendered more precarious than that of those contracting with any one else. But if the condition did not exist, expenditure by government departments would escape from the control of the House of Commons. On the whole question, see *Churchward v. Reg.*, (1865) L. R. 1 Q. B. 173, and *A.-G. v. Great Southern and Western Ry. Co. of Ireland*, [1925] A. C. 754.

The rule that no petition of right will lie for a tort alleged to have been committed by the Crown is a deduction from the maxim 'The King can do no wrong'. That doctrine has been of great advantage in the development of the constitution, for it has prevented the Crown from sheltering its servants, and so assisted in the establishment of the modern doctrines of ministerial responsibility, before the Courts and before the House of Commons. The most celebrated exposition of the doctrine is in Hale's *History of the Pleas of the Crown*, vol. i, p. 43:

'It is regularly true, that the law presumes, the king will do no wrong, neither indeed can do any wrong; and therefore, if the king command an unlawful act to be done, the offense of the instrument is not thereby indemnified; for the king is not under the coercive power of the law, yet in many cases his commands are under the

directive power of the law, which consequently makes the act itself invalid, if unlawful, and so renders the instrument of the execution thereof obnoxious to the punishment of the law.'

The principle is very old, as old as Bracton. Croke, one of the dissenting judges in *R. v. Hampden*, says (3 St. Tr. 1161-2):

'Whatsoever is done to the hurt or wrong of the subjects, and against the laws of the land, the law imputeth that honour and justice to the king, whose throne is established by justice, that it is accounted not done by the king, but by some untrue and unjust informations. This appeareth by the authorities of our books; for Bracton, lib. 3, fol. 107, who is an ancient writer in our law, said "Nihil aliud potest rex in terris, cum sit Dei minister et vicarius, quam de jure potest;" and there a little after, "Itaq; potestas juris sua est, et non injuriæ, cum sit author juris, non debet inde injuriæ nasci occasio, unde jura nascuntur." Sir Edw. Coke, in the 11th book of his Reports, in the case of Magdalen College, and there fol. 72, it is said, "hoc solum rex non potest facere, quod non potest injuste agere."'

A more modern expression of the doctrine is that of Dr. Lushington in the Privy Council case of *Rogers v. Rajendro Dutt*, (1860) 13 Moo. P. C. at p. 236:

'Neither does it seem to them [the Privy Council] to conclude the question in the action, that the act complained of is to be considered as the act of the Government, and that in the part which the defendant took in it he acted only as the officer of the Government, intending to discharge his duty as a public servant with perfect good faith, and with an entire absence of any malice, particular or general, against the Plaintiffs. For if the act which he did was in itself wrongful, as against the Plaintiffs, and produced damage to them, they must have the same remedy by action against the doer, whether the act was his own, spontaneous and unauthorized, or whether it were done by the order of the superior power. The civil irresponsibility of the Supreme power for tortuous acts could not be maintained with any show of justice, if its agents were not personally responsible for them; in such cases the Government is morally bound to indemnify its agent, and it is hard on such agent when this obligation is not satisfied; but the right to compensation in the party injured is paramount to this consideration.'

It may be added that the hardship is not all on the defendant; the plaintiff also may rightly complain if he discovers that he has been suing a defendant who is not worth powder and shot. In practice he knows at quite an early stage of the proceedings, from

the way in which the defence is conducted, whether the Crown will assume liability or not; for if the Crown provides for the defence, it invariably puts the defendant in funds so that he may satisfy judgment, if unsuccessful. But there is never any legal obligation on the Crown to assume liability in these cases.

In truth, the maxim that the King can do no wrong, so admirable in its application to deter and prevent servants of the Crown from committing breaches of the law, becomes inconvenient, not to say unjust, when compensation is sought for a tort already committed; and it may well be that it has passed its period of usefulness and should be swept away. As usually stated, the doctrine seems to imply that if the servant were allowed to allege the command of the King as a defence of his act, he would himself be relieved of liability. But, according to ordinary common law principles, if the law did take notice of the King's unlawful command, that would, so far from relieving the agent from liability, simply make the King liable also as a principal. In other words, two persons would be liable instead of one.

But although these unfortunate results may be justified as consequences of the maxim that the King can do no wrong, there is another immunity which cannot logically be justified on that ground. It is a general rule of modern law that a master is liable for all torts committed by his servants in the course and within the scope of their employment. The basis of this doctrine of vicarious liability is that a person who employs persons or things which are likely to cause damage if they get out of hand must keep them in at his peril; he does not commit a tort in employing them, otherwise every employer of labour in England would be a perpetual tortfeasor, nor does he in the strict sense of the term commit a tort when his servant commits a tort. He is made liable as a measure of public policy, and because otherwise the victim of the tort would have no effectual remedy. It is no defence to show that the master was guilty of no negligence in choosing the servant; the most perfect proof of innocence is of no avail. Why then should the conclusive presumption that the King can do no wrong help the Crown to escape a liability which affects the rest of the world? And yet on this ground it was held in three famous cases in the nineteenth century (*Viscount Canterbury v. A.-G.*, p. 244 below; *Tobin v. Reg.*, (1864) 16 C. B. (N.S.) 310; *Feather v. Reg.*, (1865) 6 B. & S. 257) that this vicarious liability cannot affect

the Crown. Possibly it owed this immunity to the confusion which so long prevailed as to the exact basis on which the liability of employers rested, and an earlier formulation of the principles which govern it at the present day would have permitted the Courts to hold the Crown responsible for the tortious acts of its servants without impugning the rule that the King can do no wrong. However, the rule is now inveterate and would almost certainly be upheld in the House of Lords in its present temper.¹ There is nothing to be hoped for except from the legislature.

The Crown's immunity from vicarious liability is inconvenient not so much because the Crown gets off scot free—for it is probable that in all proper cases the successful plaintiff actually receives the damages which have been awarded—but because there is no way of obtaining a judicial decision upon any of the difficult questions which are apt to arise in determining whether the tort was committed in the course and within the scope of the servant's employment. In an action against the servant himself the only question which can be determined is whether a tort has been committed. Everything connected with questions of vicarious liability must be left entirely to the discretion of the Crown.

To sum up, the Crown cannot be made directly or vicariously liable in tort, but its servants can always be sued without the permission of the Crown for the torts they have committed. Thus the Government may, so to say, be forced into Court, but, since the Crown itself cannot be compelled to assume responsibility, the successful plaintiff may be left without substantial relief. For everything except tort the Crown can be sued, but only with its own consent: on the other hand, though no execution can be levied on the Crown in consequence of a Petition of Right, satisfaction of the judgment follows as a matter of course. In all such cases, therefore, the Crown cannot be forced into Court, but, once there, is in virtually the same position as any other defendant.

Many futile attempts have been made to avoid the inconveniences which attach to this state of the law. Thus, whether from a desire to determine questions more peculiar to vicarious liability, or from a feeling that pressure could be more effectually brought to bear on the Crown or more adequate satisfaction obtained by attacking high officials, attempts have at times been made to affect superior officials with liability for the torts of their

¹ Cf. *Admiralty Commissioners v. S. S. Amerika*, [1917] A. C. 41, 50, 56.

subordinates; but, except where the tort has been committed by command of the superior, they have been uniformly unsuccessful. A subordinate official is not the servant of his superior; they are fellow-servants of the Crown. Hence, in accordance with common law principles, the superior is not liable for his subordinate's torts. However unfortunate this may be in practice, there is, it seems, no objection in point of theory (see *Raleigh v. Goschen*, p. 250 below, and *Bainbridge v. P. M. G.*, p. 252 below).

Then again, no doubt, in order to force the Crown into Court, and so to obviate the necessity of obtaining the *fiat*, actions have been brought against servants of the Crown on contracts which they have made on behalf of the Crown. These also have failed, for it is a clear principle of common law that if a person makes a contract as agent for a principal, he binds his principal, but is not bound himself. This is the true *ratio decidendi* in *Macbeath v. Haldimand* (p. 260 below). But unfortunately the judges went further and based their decision in part on a supposed rule of public policy which discouraged actions against ministers of the Crown by reason of the fact that they would be unduly worried by a multiplicity of actions and it would accordingly be impossible to get gentlemen of worth to undertake their duties. This principle, it will be seen, is in direct conflict with the famous words of Lord Camden in *Entick v. Carrington*, (1765) 19 St. Tr. at p. 1078: 'And with respect to the argument of State necessity, or a distinction that has been aimed at between State offences and others, the common law does not understand that kind of reasoning, nor do our books take notice of any such distinctions.' None the less it has not been without its effect. In *Gidley v. Lord Palmerston* (p. 262 below) it was used to support a decision which was quite good as it stood, and in *Dunn v. MacDonald*, [1897] 1 Q. B. 401, 555, it was made to justify the sweeping assertion that no action will lie against a servant of the Crown for breach of an implied warranty of authority. It is true that that decision can be supported on another and a safer ground. The case arose out of the same transaction as *Dunn v. Reg.* (p. 241 below). The plaintiff, having failed in his petition of right, sued MacDonald for breach of an implied warranty that he had authority to engage him on behalf of the Crown for a period of three years certain. Now it is clear as a matter of law that the Crown had no power to guarantee him security of tenure (cf. p. 219 above), and Dunn

must be presumed to have known that he was liable to be dismissed at a moment's notice. Therefore he could not be held to have relied on the implied warranty of authority. It is true that Charles J. held that the Crown had power to engage Dunn for three years certain, but this, it is submitted, is inconsistent with the authorities (especially now *Rederiaktiebolaget Amphitrite v. R.*, p. 242 below). But the case is unsatisfactory for many reasons.

Gidley v. Lord Palmerston, when rightly understood, is in substance similar to *Macbeath v. Haldimand*. The plaintiff was trying to obtain a decision against the Crown without the necessity for the *fiat*, by suing one of its servants. The true claim was against the Crown for money voted by Parliament for the benefit of the deceased. The appropriate remedy, if any, was a petition of right. In suing the defendant, the plaintiff was trying to compel him to perform a duty which he owed exclusively to the Crown, and that, on ordinary common law principles, is beyond the power of any subject (see also, for *mandamus*, *Reg. v. Lords Commissioners of the Treasury*, (1872) L. R. 7 Q. B. 387, and p. 133 above).

So far there have been anomalies and injustices, but no very serious difficulties. It is not until one deals in detail with the government departments that one finds how hopelessly unsystematic and inconvenient the law is. Into this jungle we have no wish to enter, but a few examples must be given.

In a laudable attempt to give a simpler and surer remedy to private persons who have dealings with the Government, some departments have been incorporated; some, without being incorporated, have been made capable of suing and being sued; or, in other words, been given a name by which their members may sue and be sued in their official capacity. In one case at least an official of the department has been made liable to be sued as a nominal defendant on behalf of the department and therefore of the Crown. In every case, therefore, assuming there is a cause of action against the department, investigation must be made who, if anybody, may be made defendant. Is it the incorporate department itself, or, supposing it to be an unincorporate body, some representative official or all the members of a Board? And the answer to this question may be subject to variation in the case of a single department, according as the liability rests on one particular statute or another. It may be, of course, that there is no remedy at all against the department, and the complainant is

driven to his remedy by petition of right against the Crown itself. In any event it is very unlikely that execution will issue, for in almost every case the property of the department is not its own, but administered by it on behalf of the Crown. The judgment is therefore a dry declaratory judgment.

But first of all the complainant must satisfy himself that he has a cause of action against the department. In many cases this will be clear upon the face of some statute. In many it will have to be inferred from the words of the Act. The wording of Acts of Parliament has caused very serious difficulties in this respect, and for various reasons there appears to be no safe rule for construing them. What is the exact effect of a provision that a department may sue and be sued under a certain name? Is it merely a procedural device, or does it impose on the department a substantial liability which was not previously incumbent on it? Does it, for instance, deprive the department of the protection of the rule in *Macbeath v. Haldimand*? Russell J. in *Rowland v. The Air Council*, (1928) 89 T. L. R. 228, thought it did not. But Phillimore J. in *Graham v. Public Works Commissioners*, [1901] 2 K. B. 781, thought that that rule did not apply. In that case the department was indeed incorporated, but the reasoning of the learned judge would apply equally where there was no incorporation. The two decisions can scarcely be reconciled; one would like to believe that *Graham's Case* is good law, but there are many grounds for surmising that it is not. On the whole it appears that whether the department has been incorporated or simply given a name by which it may be sued, the object in either case is merely to remove procedural difficulties and not to confer a substantial right of action where there was not one before.

There seems to be ample justification for the language used by Scrutton L.J. in *Marshal Shipping Co. v. Board of Trade*, [1928] 2 K. B. at p. 352:

'I personally feel that the whole subject of proceedings against Government departments is in a very unsatisfactory state. I feel that it is of great public importance that there should be prompt and efficient means of calling in question the legality of the action of Government departments which, owing to the great national emergencies arising out of the war, have been inclined to take action that they considered necessary in the interests of the State without any nice consideration of the question whether it was legal or not,

and I hope that the committee which is now considering the question of proceedings against the Crown will be able to give the subject more effective remedies against Government departments than he has at present.¹

After all this, it is a relief to be able to turn to a development of the present century, by which the subject is, in certain cases, enabled to obtain a decision against the Government without procuring the *fiat* of the Crown. In *Dyson v. A.-G.* (p. 265 below) it was decided that the Attorney-General can be made defendant to an action claiming a declaration that some course of conduct contemplated by the Government is illegal. There seems to be no reluctance on the part of the Courts to assist the subject in this regard. The result is, if the procedure be employed in time, largely to destroy the rule that the Crown cannot be sued in tort. But there is authority for saying that it cannot be used as an alternative or preliminary to a petition of right.

'The machinery of *Dyson v. Attorney-General* cannot be used to prejudice the issue of what may have to be adjudicated upon in a petition of right as to a money claim against the Treasury. There is a difference in substance and constitutionally between a petition of right and an action against the Attorney-General. A petition of right making a money demand against the Treasury is dealt with by the Sovereign under the advice of the Secretary of State. I have known petitions of right disallowed. But if an action is brought against the Attorney-General he has practically no choice but to appear, and in that manner the procedure marked out for a petition of right would be got rid of.'—Per Rowlatt J. in *Bombay and Persia Steam Navigation Company v. MacLay*, [1920] 3 K. B. at p. 408.

Finally, it is firmly established that the Crown ought to abide by the same rules of conduct as if it were in the position of a subject. The fact that the procedure for enforcing the obligation is defective does not justify the Crown in taking advantage of its Prerogative to the detriment of the individual subject. There would be less discontent at the present state of the law if government departments always bore in mind the words of Sir George Farwell in *Eastern Trust Co. v. Mackenzie, Mann & Co.*, [1915] A. C. at p. 759:

'It is the duty of the Crown and of every branch of the Executive

¹ The student who wishes to appreciate the more ludicrous side of this subject should read the rest of Scrutton L.J.'s judgment. For the recommendations of the committee which he mentions, see p. 228 below.

to abide by and obey the law. If there is any difficulty in ascertaining it the Courts are open to the Crown to sue, and it is the duty of the Executive in cases of doubt to ascertain the law, in order to obey it, not to disregard it.'

Note.—The Committee appointed in 1921 to consider the position of the Crown as litigant reported in 1927. Its recommendations were set forth in the form of a bill which will, if passed, do much to remove the many anomalies of this branch of the law, but which has not up to the present been placed before Parliament.

The main proposals may be shortly summarized as follows:

(1) The ordinary procedure between subject and subject is made applicable also to proceedings by and against the Crown.

(2) The necessity for obtaining the fiat of the Crown is abolished.

(3) The Crown is made liable in tort.

(4) The Crown is made liable for the torts of its servants, to the same extent as a private person; officers acting in pursuance of a duty imposed by law are to be deemed to be acting under the instructions of the Crown, but only where they hold office directly or indirectly from the Crown.

(5) Rules are to be made requiring the Crown to disclose documents relevant to the matter in issue, but the Crown may refuse to disclose any document the disclosure of which would be contrary to the public interest. The existing practice is thus made regular and obligatory.

(6) Proceedings against the Crown shall be brought against the Attorney-General.

The savings in the bill should be noted, for example,

(1) No execution may be levied against the Crown; relief is still to be roughly upon the lines prescribed by the Petitions of Right Act. It is still impossible to obtain an injunction or a judgment for specific performance against the Crown, but a declaratory judgment may be given in lieu thereof.

(2) The bill does not apply to proceedings by or against the King in his private capacity.

(3) Members of the armed forces are still left powerless against the Crown.

[Crown Proceedings Committee Report (H.M.S.O., Cmd. 2842, 1927.)]

PETITIONS OF RIGHT ACT, 1860, (23 & 24 Vict. c. 84)

‘Whereas it is expedient to amend the Law relating to Petitions of Right, to simplify the Procedure therein, to make Provision for the Recovery of Costs in such Cases, and to assimilate the Proceedings, as nearly as may be, to the Course of Practice and Procedure now in force in Actions and Suits between Subject and Subject:’ Be it therefore enacted by the Queen’s most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:

I. A Petition of Right may, if the Suppliant think fit, be intituled in any one of the Superior Courts . . . at Westminster in which the Subject Matter of such Petition or any material Part thereof would have been cognizable if the same had been a Matter in dispute between Subject and Subject . . . and shall set forth with convenient Certainty the Facts entitling the Suppliant to Relief, and shall be signed by such Suppliant, his Counsel or Attorney.

II. The said Petition shall be left with the Secretary of State for the Home Department, in order that the same may be submitted to Her Majesty for Her Majesty’s gracious consideration, and in order that Her Majesty, if She shall think fit, may grant Her Fiat that Right be done, and no Fee or Sum of Money shall be payable by the Suppliant on so leaving such Petition, or upon his receiving back the same.

III. Upon Her Majesty’s Fiat being obtained to such Petition, a copy of such Petition and Fiat shall be left at the Office of the Solicitor to the Treasury, with an Endorsement thereon . . . praying for a Plea or Answer on behalf of Her Majesty within Twenty-eight Days, and it shall thereupon be the Duty of the said Solicitor to transmit such Petition to the particular Department to which the Subject Matter of such Petition may relate, and the same shall be prosecuted in the Court in which the same shall be intituled, or in such other Court as the Lord Chancellor may direct.

[IV. Time for answering by the Crown and power to change Court or Venue.]

V. In case any such Petition of Right shall be presented for the Recovery of any . . . Property . . . which shall have been granted away or disposed of by or on behalf of Her Majesty or Her Pre-

decessors, a Copy of such Petition, Allowance, and Fiat shall be served upon . . . the Person in the Possession, Occupation, or Enjoyment of such Property . . . endorsed with a Notice . . . requiring such Person to appear thereto . . . and to plead or answer thereto in the Court in which the same shall be prosecuted. . . .

VI. Such Petition may be answered . . . by or in the name of Her Majesty's Attorney General on behalf of Her Majesty, and by or on behalf of any other Person who may in pursuance hereof be called upon to plead or answer thereto, in the same Manner as if such Petition [were a statement of claim in an ordinary action].

VII. So far as the same may be applicable, and except in so far as may be inconsistent with this Act, the Laws and Statutes in force as to Pleading, [and] Evidence . . . in . . . Actions between Subject and Subject, and the Practice and Course of Procedure of the said Courts . . . shall, unless the Court in which the Petition is prosecuted shall otherwise order, be applicable and apply and extend to such Petition of Right: Provided always, that nothing in this Statute shall be construed to give to the Subject any Remedy against the Crown in any Case in which he would not have been entitled to such Remedy before the passing of this Act.

[VIII. Judgments by Default.]

IX. Upon every such Petition of Right the . . . Judgment . . . shall be that the Suppliant is or is not entitled either to the whole or to some Portion of the Relief sought by his Petition, or such other Relief as the Court may think right, and such Court may give a . . . Judgment that the Suppliant is entitled to such Relief, and upon such Terms and Conditions (if any) as such Court shall think just.

X. In all Cases in which the Judgment commonly called a Judgment of *Amoveas manus* has heretofore been pronounced or given upon a Petition of Right, a Judgment that the Suppliant is entitled to Relief as herein-before provided shall be of such and the same effect as such Judgment of *Amoveas manus*.

[XI. Costs recoverable by the Crown and any other Person Party to the Petition.]

[XII. The Suppliant to be entitled to Costs against the Crown and other Parties to the Proceedings.]

XIII. Whenever, upon any such Petition of Right, a Judgment . . . shall be given . . . that the Suppliant is entitled to Relief . . . any One of the Judges of the Court in which such Petition shall

have been prosecuted shall and may, upon Application in behalf of the Suppliant . . . certify to the Commissioners of Her Majesty's Treasury or to the Treasurer of Her Majesty's Household . . . the Tenor and Purport of the same . . .

XIV. It shall be lawful for the Commissioners of Her Majesty's Treasury and they are hereby required to pay the Amount of any Moneys and Costs . . . out of any Moneys in their Hands for the Time being legally applicable thereto, or which may be hereafter voted by Parliament for that Purpose, provided such Petition shall relate to any public Matter; and in case the same shall relate to . . . any Matter affecting Her Majesty in Her private Capacity . . . the Amount to which the Suppliant is entitled shall be paid to him out of such Funds or Moneys as Her Majesty shall be graciously pleased to direct to be applied for that Purpose.

[XV. Power to Judges to make Rules and Regulations, &c.]

[XVI. Interpretation of Terms.]

[XVII. Short Title.]

XVIII. Nothing in this Act contained shall prevent any Suppliant from proceeding as before the passing of this Act.

CASES

THOMAS v. THE QUEEN, (1874) L. R. 10 Q. B. 81

QUEEN'S BENCH

The judgment of the Court (Blackburn, Quain and Archibald JJ.) was delivered by

BLACKBURN J.—This is a petition of right alleging, in two counts, promises made on behalf of the Queen, and breaches of those promises, to which the Attorney General demurs.

Several objections are made in the points delivered as to the form of the counts, and the absence of sufficient allegations that those who made the promises had authority to contract on the behalf of Her Majesty; some of which, especially as applied to the second count, might probably have forced the suppliant to amend, but the Attorney General, on the argument, declined to press any objection which could be cured by an amendment; and the question argued before us was that concisely and properly stated in the first and second points of argument delivered, viz.: That a

petition of right will not lie for any other object than specific chattels or land, and that it will not lie for breach of contract, nor to recover money claimed either by way of debt or damages.

We leave it for future discussion to determine who have authority to make contracts on behalf of Her Majesty, and whether the contracts on which the suppliant proceeds were in fact made by any one on behalf of Her Majesty, and if so made, whether they were made within the scope of that person's authority. On these points we express no opinion. Contracts can be made on behalf of Her Majesty with subjects, and the Attorney General, suing on her behalf, can enforce those contracts against the subject; and if the subject has no means of enforcing the contract on his part, there is certainly a want of reciprocity in such cases. But it is quite settled that on account of her dignity no action can be brought against the Queen; the redress, if any, must be by petition of right, which is now regulated by 23 & 24 Vict. c. 34. If the suppliant ultimately recovers, he obtains, under s. 9, a judgment of the Court that he is entitled to such relief as the Court shall think just. And this form of judgment would be applicable to the case in which it appeared to the Court that the plaintiff was entitled to be paid damages for the non-fulfilment of a contract.

It appears that at the time of the passing of the Act there was a general impression that a petition of right was maintainable for a debt due or a breach of contract by the Crown; the opinion to that effect expressed in Lord Somers' argument in the *Bankers' Case*, (1700) 14 How. St. Tr. at p. 39 (to which more particular reference will presently be made) had been adopted by Chief Baron Comyns (1 Com. Dig. Prerogative D. 78) and by Serjeant Manning, in his treatise on the Practice of the Court of Exchequer, where he says, at page 84, that 'Chattels personal, debts, or unliquidated damages, may be recovered under it;' and it is well known that the case, by which attention was particularly directed to the unsatisfactory nature of the procedure, and which led to the passing of the Act (vide letter of Mr. Archibald to Sir W. Bovill) was the case of *Von Frantzius v. Reg.*, in which a petition of right had been presented in the old form upon a contract for the supply of provisions to the British fleet, in which it never appears to have occurred to the then Attorney General, Sir R. Bethell, to question the right of this suppliant to sue by petition for breach

of contract. Indeed, the framers of the Act appear to have considered its chief utility to consist in the applicability of its improved procedure to petitions on contracts between subjects and the various public departments of the government, so vastly on the increase in recent years, both in numbers and importance; whilst petitions of right in respect of specific lands or chattels must for the future be exceedingly rare.

But the 7th section of the Act expressly provides that 'nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act.'

We are therefore called upon to determine the correctness of the general impression referred to, and whether before that statute a petition of right lay in respect of the nonfulfilment of a contract made by the authorized agent of the sovereign.

There is no statute that gives any such right, which, if it exists, does so at common law; and unfortunately the authorities to which we must have recourse are many of them antiquated and connected with forms of procedure with which no one now alive is familiar, and which we now approach with diffidence, as they may be misapprehended by us.

The argument against the petition of right lying in such a case is, we think, entirely grounded on the absence of ancient precedents. And that is undoubtedly a strong argument. All the entries in the ordinary courts that have been brought to our notice are (with the exception of the *Bankers' Case* and *Wroth's Case*, (1578) Plow. 452, on which it proceeded, as to which we shall observe presently) entries of petitions in the nature of a real action to recover freehold land or a freehold rent issuing out of land; and in all the judgment is that of 'amoveas manus.' And in *Wroth's Case* and the *Bankers' Case*, in which the judgment was different, the annuity recovered was a freehold annuity. It is too much to say that all the entries existing must have been of this nature; a search in the Petty Bag, where the records of these proceedings are kept, might possibly be rewarded by finding some in which there was a judgment in respect of a debt due from or a covenant made on behalf of the Crown. But none such have been produced; and the inferences sought to be deduced from the absence of precedents are, either that in the early times, when the remedy by petition of right was formed, it was confined to cases in which the

freehold was concerned, that being the only interest then of sufficient consequence to lead to the framing of a remedy; or that from respect to the King the remedy was confined to cases in which redress could be granted by an order to the King's officers to withdraw; and did not extend to cases in which, unless the King chose to pay, there could be no effectual relief unless the King's treasure or lands and chattels were taken in execution; and that it could not be supposed that a judgment would be given which could not be enforced.

We must observe, as to this last argument, that the moral effect of such a judgment, though it could not be enforced, must at all times have been great, and, without adopting the whole of the polite fiction of the law which, as stated by Blackstone, 2 Com. p. 225, presumes that to know of any injury and to redress it are inseparable in the royal breast, we may say that at all times the refusal of the Crown to pay its just debts was much more likely to be based on a sincere or pretended denial on the part of the Crown's advisers of the justice of the debts than on a bare-faced avowal of an intention to avail themselves of the power to refrain from doing right.

But we think that, in at least one important branch of the law, there is sufficient authority that a petition of right lies where the judgment could not have amounted to more than a declaration of the title to redress, leaving it to the Crown to give that redress afterwards.

In grants of real estates in the old times there was generally a warranty or covenant real by the donor to the donee. And if the donee was sued in a writ of right he might vouch his warrantor, who was then bound to defend the action. If judgment went against the vouchee, the demandant recovered the land, and the tenant had judgment against the vouchee for recompence in value for the lands he lost. If the donee was deprived of the lands in a possessory action where voucher was not permitted, his remedy against the donor who had warranted the title was by *warrantia chartae*:¹ see 1 Fitz-Herbert de *Naturâ Brevium*, p. 184. But in cases where the king had granted lands with a warranty, it is declared by the Statute de Bigamis, 4 Edw. 1. c. 1, that, where the tenant prayed aid of or vouched the king, the suit should be stayed until a writ of *procedendo* was awarded. This writ of *procedendo*,

¹ This was a personal action for damages [Ed.].

Lord Coke (2 Inst. p. 269) says, is a writ which the king ex merito justitiæ ought to grant.

No records have been brought to our notice shewing the mode in which proceedings were taken in Chancery to obtain the writ of procedendo, though the cases in which the question must have risen are very numerous: see the title 'Aide de Roy,' in Fitz-Herbert's Abridgment; but one may suppose them to have been much in the nature of those in Chancery in a petition of right. When the procedendo was awarded, if the tenant could make no defence against the demandant, he would, where the grant of the Crown contained a warranty, lose the land, and have the same right against the Crown to recompence in value which he would have had against his vouchee, if a subject; but he would not have the same remedy. In such a case he could, however, sue for recompence in value by petition of right. This is proved by the case of *Earl of Warwick v. Duchess Dowager of Clarence* (Year Book, 9 H. 6 Pasch. pl. 7, folio 3).

[*The learned judge described and discussed this case.*]

The importance of this case is, that it shews that then it was so well established that a petition of right lay in the nature of voucher or warrantia chartæ as to have given rise to a settled mode of pleading. On such a petition the judgment could not have been an amoveas manus, but must have been either a dry judgment that the suppliant had a right to recompence in value, or one giving an execution against the land of the king. Should the present case be taken into the Court of Appeal, it will be desirable to search the records to see what was the form of judgment in a petition of right in the nature of voucher.

And as to the other objection that the petition of right was only in cases where the freehold was concerned, there is the dictum which has been so often cited from the Year Book, 34 H. 6 Trinity, pl. 18, f. 51, in the case of *Rex v. William Hoove*, which, though only a dictum, has been adopted by Stanford. (Stanford's Exposition of the King's Prerogative, ch. 22, p. 76.) There, in the course of arguing, Wangford says: 'You cannot have a petition of right unless in respect of land. Quod fuit negatum per omnes justiciarios, who said that in many cases a man shall sue by petition to have back his goods and chattels.' Against this is to be put the dictum in 1 H. 7, folio 3, pl. 3, not in any judicial proceeding, but at a meeting of all the judges, to advise what amendments in the

law should be proposed in Parliament. Amongst others, an amendment in the law as to traverse of office seems to have been discussed, in the course of which Catesby says that 'petition at common law lies not, unless of a freehold at least, to which Hussey assented.' Of the two dicta it seems to us that the opinion expressed, though unnecessarily, in a judicial proceeding is entitled to most weight. The entries in the *Rotula Parliamenti* shew that in the reigns of our early kings petitions relating to almost everything were brought before the king in Parliament. Lord Somers, in the *Bankers' Case*, treats it as clear that the various petitions he cites from Ryley were petitions of right, whilst Lord Holt seems to think them petitions of complaint. Lord Coke, in the 4 Inst. 11, says of petitions in Parliament, 'some be of right, some of grace, and some mixt of both.'

No one who looks at the rolls as published by the record commissioners, can fail to see that very many of the petitions in the times of Edward I and Edward II were not in the nature of suits at all, whilst many look very like suits. It seems to have been in those times unsettled whether parliament was not a Court of original jurisdiction; later, it was settled that it was not.

We should be sorry if obliged to form an opinion on so obscure a matter as a ground for our decision, especially when such great authorities have differed upon it. And we think it is not necessary so to do. For, in our opinion, the reasons given by Lord Holt in favour of the judgment which was ultimately adopted by the House of Lords, as well as the reasons given by Lord Somers for reversing it, both lead to the conclusion that a petition of right lies in such a case as the present.

As our judgment proceeds mainly on the authority of the *Bankers' Case*, we think it right to state that case somewhat at length. Charles II had, by letters patent under the great seal, granted to the bankers who had been deprived of their money by the shutting of the Exchequer, and to their creditors, annuities in fee, at the rate of six per cent. on the moneys thus detained. These annuities were charged on the hereditary revenue of the excise. No pains had been spared to make the letters patent as binding as possible. They contained inter alia a covenant from the king for himself, his heirs, and successors, under the great seal, that due payment should be made, and that if there was any defect in these letters patent the king, his heirs and successors, would

make a further grant; and the treasurers, &c., were commanded to give to the patentees tallies, and to pay them. The annuities were paid for four years, and then the further payment ceased. During the reigns of Charles II and James II, the bankers took no steps at law to enforce their claims, but in the first year of William and Mary (1689), when, as Lord Somers suggests, it had become safe to sue the Crown, they commenced proceedings. If, under a petition of right, they could only have obtained a bare declaration of their right to be paid, then they would have got little more than they had already, inasmuch as the letters patent already contained under the great seal as strong a declaration of the patentees' rights as could be devised. And in *Wroth's Case*, they found a precedent in which, on a petition to the Barons of the Exchequer, judgment had been given against the Crown, that the letters patent creating the annuity should be enrolled, and execution in the shape of a writ, commanding the treasurers and chamberlains of the Exchequer to pay the annuity and its arrears. This precedent the patentees in the *Bankers' Case* followed. The Attorney General demurred to their petition. The majority of the Exchequer gave judgment against the Crown in the same form as in *Wroth's Case*. Then error was brought before the Lord Keeper, assisted by the advice of the justices of either bench. By this time, Treby, who, as Attorney General had demurred and brought the writ of error, had become Chief Justice of the Common Pleas, and Somers, who, as Solicitor General had argued for the Crown in the Exchequer, had become Lord Keeper. And the Lord Keeper, with the concurrence of Treby, Chief Justice of the Common Pleas, and against the opinion of Holt, Chief Justice of the Queen's Bench, and the six puisne justices, reversed the judgment in the Exchequer. The modern etiquette, by which a judge who has been counsel in a cause abstains, if possible, from taking any part in the judgment on it, seems not then to have been thought of, and no comment seems to have been made at the time on what would now be the subject of much remark. The judgment of the barons below, and the arguments of the six puisne judges on the appeal have nowhere been preserved. There is in 5 Modern Rep. at pp. 46, 53, a very imperfect note of Treby's argument delivered in Trinity Term, 7 Wm. 3 (June, 1695), and of Holt's argument delivered in Michaelmas Term, 7 Wm. 3 (November, 1695), of which there is a fuller, though still an imperfect report, in Skinner's

Reports, p. 601. In parts it is a reply upon Treby's argument. Lord Somers took several months to prepare a very elaborate judgment, which he delivered in Trinity Term, 8 Wm. 3 (June, 1696). This was published at the time under the title of Lord Somers' argument, and is reprinted in the fourteenth volume of the State Trials, p. 39. It is avowedly a reply upon Holt. The judgment was taken by appeal to the House of Lords, and there reversed, and the judgment of the Exchequer affirmed. Holt had there an opportunity to answer Lord Somers, of which he probably availed himself; but, as at that time the publication of what passed in the House of Lords, even in a judicial proceeding, was strictly prohibited, there is no report now extant of what passed.

After all, the execution against the treasurer and chamberlain seemed to have proved unproductive, and (not much to the honour of the government), the bankers were obliged to compromise by accepting 10s. in the pound, secured by stat. 12 & 13 Wm. 3, c. 12, s. 15. We are at present only concerned with that part of the arguments in the *Bankers' Case* which bears on the question whether the patentees had a remedy by petition of right.

Treby C.J. expresses his opinion to be that the letters patent of Charles II. bound the hereditary excise in the hands of the King's successors, and consequently that the patentees had a right to be paid, and as may be inferred from what Holt says in answering him, that they might by petition of right have that right declared, for which he seems to have cited *Everle's Case*, Ryley's Pl. Parl. 251 (88 Edward I); 1 Rot. Parl. 164, No. 52. He seems to have denied that the barons had any original jurisdiction in such a case, or could interfere, unless the case was sent to them by the Crown on petition of right; but he seems mainly to have argued that though there was a right in the creditors of the Crown, they had no remedy at law to enforce that right. 'I take it,' he says, 'that the treasurer may, if he pleased, pay these annuities to the petitioners, but whether he will do it or not is left to his conscience and discretion; but he cannot be compelled to it but by authority of parliament.' (5 Mod. at pp. 46, 48.)

Holt C.J., after giving his reasons for holding that the letters patent bound the King's successors, proceeds to discuss the question of the remedy (Skin. at p. 608): As to the remedy, he held also that the patentee had taken a proper remedy; he said that all his Brothers had agreed that he had a legal right, and therefore

had a legal remedy, and it is vain to have one without the other, and he said first that *monstrans de droit* and petition of right were the remedies in such case at common law, and the party in this case is not put to his petition of right. A petition of right is not necessary, though if he will admit himself out of possession he might have a petition of right. He then proceeds to argue that the petition of right was not necessary because the patentees' title already appeared on record.

As to *Everle's Case* he seems to admit that there might in that case have been a petition of right originating in parliament, but maintains that if it had been a petition of right, the King would have indorsed it, 'Let right be done,' and sent it to Chancery. As it was, he treats it as a petition of complaint, and as if the answer was no more than referring the petitioner to what Holt considered his common law remedy by *monstrans de droit* in the Exchequer. All this is disputed by Lord Somers. But it is to be observed that the difference between them was as to the question whether there was a remedy by petition to the barons of the Exchequer. The whole tenor of Holt's reasoning is, that in any case where there was a legal right against the Crown there must be a legal remedy, and one which could be made effectual. He expressly says that a petition of right was a remedy, but not the only remedy, as he maintained, where the grant was by letters patent under the great seal.

Certainly there is nothing to indicate that in Holt's opinion there was not, in the case of a Crown debt, even the imperfect remedy of a petition of right. Lord Somers' very elaborate argument is entirely directed to establishing that there was no power in the barons of the Exchequer to order the treasurer and chamberlains to make these payments; and as a step, and an important step, in his reasoning, he sets himself to prove that there was a remedy by petition of right which was, as he maintained, the only remedy. He denies Holt's position that *monstrans de droit* was at common law. And he says (14 How. St. Tr. at p. 84) 'Indeed I take it to be generally true, that in all cases where the subject is in the nature of a plaintiff to recover anything from the King, his only remedy at common law is to sue by petition to the person of the King. I say where the subject comes as a plaintiff. For, as I said before, when on a title found for the King by office, the subject comes in to traverse the King's title, or to shew his

own right,¹ he comes in in the nature of a defendant; and is admitted to interplead in the case with the King in defence of his title, which otherwise would be defeated by finding the office. And to shew that this was so, I would take notice of several instances. That in the case of debts owing by the Crown, the subject's remedy was by petition appears by *Aynesham's Case*, (1295) Ryley's Pl. Parl. 251, which is a petition for 19*l.* due for work done at Carnarvon.' And he cites many other entries in parliament from Ryley.

Whether Lord Somers was right or not in thinking that the entries in Ryley are petitions of right, there can be no question that he here expresses a distinct and considered judgment that a petition of right would lie against the Crown for a simple contract debt, such as that for wages. And unless we overrule this judgment of his, which is not opposed to Holt's reasoning, and cannot therefore be considered as necessarily overruled by the House of Lords, we must in this case give judgment for the suppliant, and we do not find that this opinion of Lord Somers has been questioned since, but rather the contrary.

In Comyns' Digest, Prerogative, D. 78, it is said that petition lies if the King does not pay a debt, wages, &c.: citing Lord Somers' arg. 85; the Chief Baron Comyns expresses no doubt as to the soundness of the doctrine thus cited by him. It appears in *Macbeath v. Haldimand*, (1786) 1 T. R. at p. 178, that Lord Thurlow² and Buller J. (both obiter, it is true), expressed an opinion that a petition of right lay against the Crown on a contract; and a similar opinion seems to have been expressed by the Barons of the Exchequer in *Oldham v. Lords of the Treasury*, (1800-27) 6 Sim. 220, and in *Baron de Bode's Case*, (1845) 8 Q. B. 274, in which the point was raised, though not decided. Lord Denman declares 'an unconquerable repugnance to the suggestion that the door ought to be closed against all redress and remedy,' a doctrine much resembling what Lord Somers calls Lord Holt's 'popular opinion,' that if there be a right there must be a remedy. In *Viscount Canterbury v. Attorney General*, (1842) 1 Ph. 306, it was decided that the sovereign could not be sued by petition of right for negligence; and in *Tobin v. Reg.*, (1864) 16 C. B. (N.S.) 310; 33 L. J. (C. P.) 199, that the sovereign could not be sued in petition

¹ i. e. by *monstrans de droit* [Ed.].

² This is a mistake for Lord Mansfield [Ed.].

of right for a wrong. But in neither case was any opinion expressed that a petition of right will not lie for a contract, Erle C.J. expressly saying (16 C. B. (N.S.) at p. 335) that 'claims founded on contracts and grants made on behalf of the Crown are within a class legally distinct from wrongs;' and in *Feather v. Reg.*, (1865) 6 B. & S. 294; 35 L. J. (Q. B.) 200, it is assumed in the judgment that it does lie 'where the claim arises out of a contract, as for goods supplied to the Crown on the public service.'

We think, therefore, that we are bound by the *Bankers' Case*, to hold that the judgment on this demurrer should be for the suppliant.

Judgment for the Suppliant.

DUNN v. THE QUEEN, [1896] 1 Q. B. 116

COURT OF APPEAL

Application for judgment or a new trial, on the ground of misdirection, in a petition of right tried before Day J., with a jury.

The case set up by the suppliant was that Sir Claude McDonald, Her Majesty's Commissioner and Consul-General for the Niger Protectorate in Africa, acting on behalf of the Crown, had engaged him in the service of the Crown as consular agent in that region for a period of three years certain, and he claimed damages for having been dismissed before the expiration of that period. It appeared that Sir Claude McDonald himself held office only during the pleasure of the Crown. The learned judge held that contracts for the service of the Crown were determinable at the pleasure of the Crown, and therefore directed a verdict and judgment for the Crown.

LORD ESHER M.R. delivered judgment dismissing the application.

LORD HERSCHELL.—I am of the same opinion. The petitioner was appointed by Sir Claude McDonald consular agent for the Niger Protectorate, and as such he was the servant of the Crown, representing the Crown for certain purposes. The question is whether the Crown was entitled to dismiss the petitioner. His case is that, he being engaged for a period of three years, the Crown had no right to put an end to his engagement as it did, and he is therefore entitled to damages. I take it that persons employed as the petitioner was in the service of the Crown, except in cases

where there is some statutory provision for a higher tenure of office, are ordinarily engaged on the understanding that they hold their employment at the pleasure of the Crown. So I think that there must be imported into the contract for the employment of the petitioner the term which is applicable to civil servants in general, namely, that the Crown may put an end to the employment at its pleasure. In this case there is not a tittle of evidence that, supposing it were possible, Sir Claude McDonald had any authority to employ the petitioner on any other terms than those which are applicable to the civil service generally. It seems to me that it is the public interest which has led to the term which I have mentioned being imported into contracts for employment in the service of the Crown. The cases cited shew that, such employment being for the good of the public, it is essential for the public good that it should be capable of being determined at the pleasure of the Crown, except in certain exceptional cases where it has been deemed to be more for the public good that some restriction should be imposed on the power of the Crown to dismiss its servants.

KAY L.J. delivered judgment to the same effect.

Application dismissed.

REDERIAKTIEBOLAGET 'AMPHITRITE' v. THE KING,
[1921] 3 K. B. 500

KING'S BENCH DIVISION

ROWLATT J.—In this case the suppliants are a Swedish ship-owning company who sue the Crown by petition of right for damages for breach of contract, the breach being that the ship *Amphitrite* was refused a clearance to enable her to leave this country, when she had entered a British port under an arrangement whereby she was promised that she should be given that clearance. Now undoubtedly the suppliants desired to get the clearest and most binding assurance that was possible. Their vessel was free; they might have employed her elsewhere; and they had experience of the difficulties encountered by foreign ships in getting away from this country when once they had come here. Accordingly they wrote on March 8, 1918, to the British Legation at Stockholm and asked whether, in the event of the vessel being

put in trade between Sweden and England, the Legation could give them a guarantee that she would be allowed free passage without being detained in Great Britain. The Legation replied that they were 'instructed to say that the S.S. *Amphitrite* will earn her own release and be given a coal cargo if she proceed to the United Kingdom with a full cargo consisting of at least 60% approved goods.' That reply was given by the British Legation after consulting the proper authorities, and I must take it that it was given with the highest authority with which it could be given on behalf of His Majesty's Government. And the British Government thereby undertook that if the ship traded to this country she should not be subjected to the delays which were sometimes imposed. The letters in which that undertaking was contained were written with reference to an earlier voyage which was allowed to go through, the undertaking being on that occasion observed. But the undertaking was renewed with respect to the voyage in connection with which the present complaint arises by a letter from the British Legation, in which it was stated that 'the S.S. *Amphitrite* will be allowed to release herself in her next voyage to the United Kingdom'—that is to say, upon the same terms as before. Now under those circumstances what I have to consider is whether this was a contract at all. I have not to consider whether there was anything of which complaint might be made outside a Court, whether that is to say what the Government did was morally wrong or arbitrary; that would be altogether outside my province. All I have got to say is whether there was an enforceable contract, and I am of opinion that there was not. No doubt the Government can bind itself through its officers by a commercial contract, and if it does so it must perform it like anybody else or pay damages for the breach. But this was not a commercial contract; it was an arrangement whereby the Government purported to give an assurance as to what its executive action would be in the future in relation to a particular ship in the event of her coming to this country with a particular kind of cargo. And that is, to my mind, not a contract for the breach of which damages can be sued for in a Court of Law. It was merely an expression of intention to act in a particular way in a certain event. My main reason for so thinking is that it is not competent for the Government to fetter its future executive action, which must necessarily be determined by the needs of the community

when the question arises. It cannot by contract hamper its freedom of action in matters which concern the welfare of the State. Thus in the case of the employment of public servants, which is a less strong case than the present, it has been laid down that, except under an Act of Parliament, no one acting on behalf of the Crown has authority to employ any person except upon the terms that he is dismissible at the Crown's pleasure; the reason being that it is in the interests of the community that the ministers for the time being advising the Crown should be able to dispense with the services of its employees if they think it desirable. Again suppose that a man accepts an office which he is perfectly at liberty to refuse, and does so on the express terms that he is to have certain leave of absence, and that when the time arrives the leave is refused in circumstances of the greatest hardship to his family or business, as the case may be. Can it be conceived that a petition of right would lie for damages? I should think not. I am of opinion that this petition must fail and there must be judgment for the Crown.

Judgment for the Crown.

VISCOUNT CANTERBURY v. THE ATTORNEY-GENERAL,
(1842) 1 Ph. 306

COURT OF CHANCERY

This was a petition of right in which the Petitioner, Viscount Canterbury, claimed compensation from the Crown for damage alleged to have [been] done, in the preceding reign, to some property of the Petitioner, while Speaker of the House of Commons, by the fire which, in the year 1834, destroyed the two Houses of Parliament.

The fire had been caused by the negligence of persons in the employment of the Commissioners of Woods and Forests.

LORD LYNDHURST L.C.—This was a demurrer by the Attorney-General to a petition of right.

The first question was whether, as between one subject and another, an action can be maintained for damage through fire in a dwelling-house, occasioned by the negligence of the owner or his servants.

[His Lordship discussed this question at length, but eventually

come to the conclusion that it was not necessary to decide it in the present case, for the petitioner must fail on another ground.]

There is in the way of the Petitioner a difficulty which struck me at the very commencement of the argument, and to which I have not had a sufficient answer. It is admitted that, for the personal negligence of the Sovereign, neither this nor any other proceedings can be maintained. Upon what ground, then, can it be supported for the acts of the agent or servant? If the master or employer is answerable upon the principle that *qui facit per alium, facit per se*, this would not apply to the Sovereign, who cannot be required to answer for his own personal acts. If it be said that the master is answerable for the negligence of his servant, because it may be considered to have arisen from his own misconduct or negligence in selecting or retaining a careless servant, that principle cannot apply to the Sovereign, to whom negligence or misconduct cannot be imputed, and for which, if they occur in fact, the law affords no remedy.

Cases have arisen of damages done by the negligent management of ships of war. It has been held that where the act is done by one of the crew, without the participation of the commander, the latter is not responsible. (See *Nicholson v. Mounsey*, (1812) 15 East, 384.) But if the principle now contended for be correct, the negligence of the seamen in the service of the Crown would raise a liability in the Crown to make good the damage, and which might be enforced by a petition of right. Though several cases of this nature have happened at different periods, it seems never to have occurred to the parties injured or to their advisers, that redress could be obtained by means of a petition of right. It would require, I think, some very precise and distinct authority to establish such a liability, and in the absence of any such authority, I cannot venture, for the first time, to lay down a rule which it is obvious would lead to such extensive consequences. I have not lost sight of the case of *Gervaise de Clifton*, which was referred to as establishing this position, but I pass it by for the present, as I shall hereafter have occasion to advert to it.

Another objection has been urged against the claim of the Petitioner. If the case were between subject and subject, this objection would be fatal; and it is admitted, on the part of the Petitioner, that he can only expect to succeed if he would have had

a right to redress in an action against a private individual. Now, the cause of action arose in the time of the late King, and it is clear that had this been a case between subject and subject, an action could not have been supported, upon the principle that *actio personalis moritur cum personâ*. It is contended that a different rule prevails where the Sovereign is a party; but some authority should be adduced for such a distinction. It is true, indeed, that the King never dies; the demise is immediately followed by the succession; there is no interval. The Sovereign always exists; the person only is changed. But if there be a change of person, why is the personal responsibility arising from the negligence of servants (if indeed such responsibility exists) to be charged upon the successor, ceasing as it does altogether in the case of a private individual? In the case of a subject the liability does not continue in respect of the estate; it devolves neither upon the heir nor the personal representative; it is extinct. I should find it difficult, therefore, in the case of the Crown, to say with any confidence that the liability continued and was transferred to the successor unless some distinct authority were shewn in support of such a doctrine. Several cases were referred to for this purpose in the argument at the Bar; but they were cases of grant, covenant, debt, or relating to the right of property, in which, from analogy to the case of a subject, the Crown might be liable in respect of the succession, and do not, I think, sufficiently establish the principle for which they were cited. The case of Robert de Clifton, to which I shall hereafter refer in connection with that of Gervais de Clifton, fails in respect of the fact, and does not support the position.

Another objection arises out of the establishment of the Commissioners of Woods and Forests. Her Majesty, in imitation of the course pursued by her predecessors, has given up her territorial possessions to the public during her life; and Parliament has in exchange made a provision for the civil list and the personal expenses of the Sovereign out of the Consolidated Fund. For the purpose of managing these territorial possessions, and of executing such works as the civil service requires, Parliament has created certain public officers, viz., the Commissioners of Woods and Forests.

The salaries of these commissioners and the expenses of the establishment, and of managing the business of this department,

which is placed under the control of the Treasury, are defrayed out of the revenues arising from the property so surrendered, and are consequently paid by the public. These officers are appointed by the Crown, and are removable at pleasure. The subordinate agents are appointed by the commissioners, and removable by them. The Crown has nothing to do with their appointment or removal. It is by these agents that, according to the statement in the petition, the fire was occasioned.

Now, assuming that the fire had been caused by the personal negligence of the commissioners, would the Crown, in such case, have been liable to make good the loss? They are, indeed, styled servants of the Crown; but they are, in truth, public officers appointed to perform certain duties assigned to them by the Legislature, and for any negligence in the discharge of such duty, and any injury that may be thereby sustained, they alone are, I conceive, liable. Is it supposed that the Crown is responsible for the conduct of all persons holding public offices and appointments, and bound to make good any loss or injury which may be occasioned by their negligence or delinquency? At least some authority should be cited in support of such a doctrine. But then, it is said, these officers are appointed by the Crown, and are removable at the pleasure of the Crown. That circumstance alone will not, I conceive, create any such liability. The Keeper of the Great Seal and other persons holding high situations in the State have authority to appoint to many offices, and also to remove the persons so appointed at their pleasure. But they are not, on that account, subject to make compensation for injury occasioned by the neglect or misconduct of the persons so appointed. The mere selection of the officers does not create a liability. But if the Crown would not be responsible for the act done, had it been done by the superiors, it follows that it cannot be held liable for the negligence of their subordinate agents whom they appoint and remove, and with the selection or control of whom the Crown has no concern.

The remaining question is as to the remedy by petition of right. Does it apply in such a case as the present? Staunford says,—‘Petition is all the remedy the subject hath when the King seizeth his land or taketh away his goods from him, having no title by order of his laws to do so, in which case the subject, for his remedy, is driven to sue unto his Sovereign Lord by way of petition only, for other remedy hath he not.’ He speaks of this proceeding as

applicable to the illegal seizure by the King of the *lands* or *goods* of a subject: and although this is not conclusive against its application to other cases, yet no instance has been cited, with the exception of that of Gervais de Clifton, to which I shall presently refer, in which the remedy by petition of right has been attempted to be applied, to recover, not any property, but damages simply for a wrongful act alleged to have been committed by the Crown or its servants. It seems, indeed, to have been doubted whether a petition of right could even be maintained for a chattel or for anything short of a freehold interest (1 H. 7, 3 Bro. Pet. 19); and although this opinion does not appear to be well founded, yet, coupled with the absence of any decision or *dictum* in favour of this attempt, it affords an argument against the application of this remedy to a case like the present (Br. Abr. Pet. pl. 3; 34 H. 6, 51; 7 H. 7, 11; and the above passage in Staunford). No industry has been wanting on the part of the Petitioner. The Year Books, with the abridgments of Fitzherbert and Brooke, and other authorities, have been carefully searched, and no case has been found to warrant this proceeding. The decisions go back several hundred years, and in the absence of all precedent during so long a period, I think I should not be justified in deciding, for the first time, that such a proceeding can be maintained. Indeed, if the Crown cannot be guilty of negligence or personal misconduct, and is not responsible for the negligence or personal misconduct of its servants, it follows, of course, that in those cases there can be no such remedy; and, on the other hand, the absence of all trace of the remedy would itself afford a strong argument against the liability.

But the case of Gervais de Clifton is relied upon as a precedent in favour of the claim. That case, which stands by itself, occurred in the reign of Edward III. It went off at almost the earliest stage upon a point of form, viz., that the Chancellor had sent the tenor of the verdict, instead of the verdict itself, into the Court of King's Bench. It led to no argument, to no discussion, and to no judgment. It is obvious that the defect in form might have been soon and easily removed; but no steps for this purpose appear to have been taken, and there is no trace of the claim having been afterwards prosecuted. No reliance can therefore be properly placed upon this proceeding.

But a similar complaint appears to have been made upwards

of twenty years before, viz., in the 18th of Edward II., by Robert de Clifton, at that time the owner of the property, and the nature of the complaint throws, I think, some light upon the other proceeding. The Petitioner states, among other things, that trenches were dug and certain works erected by the wardens of Nottingham Castle on the land of the Petitioner, by which the waters of the Trent were diverted from their accustomed channel and made to flow over the Petitioner's property, and that turves were taken from the Petitioner's land to repair these works, and that his estate was, by these means, much injured, while the King's mills were greatly benefited. It appears, therefore, from this statement, that some of the works complained of were formed on the Petitioner's land, and were kept up and repaired by the wardens of Nottingham Castle, who continually exercised acts of ownership for this purpose over the property, and that the works were necessary for the King's mills, four of which must, as it was stated, have been otherwise discontinued. There was, therefore, some colour in this case for a petition of right; for the wardens had formed these works on the Petitioner's land, and held and maintained them on account and for the benefit of the King. But still this does not appear to have been a petition of right. It is a petition presented in Parliament, and it recites a commission and inquisition, whereas, in a petition of right, the commission and inquisition are subsequent to, and consequent on, the petition: and the prayer is for a matter of pure grace and favour, viz., that the King would, as a compensation for the injury the Petitioner had sustained, appoint him to the stewardship of the Honour of Peveril, paying a small annual rent, as usual, into the Exchequer. The King directed, in answer, that the matter should be referred for inquiry to certain members of the Council.

But this case was cited for another purpose, viz., to shew that a mere wrong committed in the time of one monarch might be made the subject of a petition of right to his successor. It does not, however, answer this purpose; for, even assuming the alleged injury to have been the same as in the subsequent case of Gervais de Clifton, it was a continuing injury, and the inference therefore altogether fails. It may further be observed, in reference to the case of Gervais de Clifton, that if the wardens held and maintained on account of the Crown, and under a claim of right, the works formed and erected in the time of Robert, which is not

improbable, this might have afforded some ground for the petition of right presented by Gervais.

I am compelled to come to the conclusion that this proceeding cannot be maintained, and that the demurrer of the Attorney-General must be allowed. It is a great satisfaction to me to know that in this singular and novel case, involving much that is obscure and almost obsolete, if I am wrong in the opinion I have given (and I have formed it not without care and much anxious consideration), it is open to review by writ of error, should the Petitioner be advised that there are sufficient grounds to question its correctness.

Extract from

RALEIGH v. GOSCHEN, [1898] 1 Ch. 73

CHANCERY DIVISION

ROMER J.— . . . The plaintiffs are complaining of an alleged trespass said to have been committed on their land, and for which they claim damages, and they ask for an injunction to restrain further trespass on the land which they say is threatened. Now, in the first place, inasmuch as the plaintiffs could not sue the Crown for a past or threatened trespass, they could not, in respect of any trespass, sue the defendants in the capacity of agents for or as representing the Crown. Again, the plaintiffs could not sue the defendants merely on the footing that, as representing a branch of the executive Government, the defendants were responsible for a trespass committed or threatened by some officials or persons in the employment or under the control of the Government, or of the Admiralty as a Department of the Government, even though those officials or persons purported to act on behalf of or as representing the Crown, or the Government, or the Admiralty. And further, even if some of the defendants, acting on behalf of the Crown, or of the Government, or of the Admiralty, had committed or threatened a trespass, that would not justify the plaintiffs in suing the other defendants if they had taken no part in the transaction. On the other hand, the plaintiffs could sue any persons actually committing or threatening the trespass, even though those persons only acted on behalf or by the authority of the Government, or of the defendants as representing the Admiralty. Moreover, I do not think the rights of the plaintiffs would, of

necessity, be confined to an action against those actually committing the trespass, who might be some very humble persons. If a trespass was committed by those persons by the order or direction of some higher officials, so as in substance to have been the act of those higher officials, then the latter could be sued. For example, suppose the captain of a ship to have unlawfully ordered some of his sailors to take possession of a house and they obeyed his order, he could be sued for the trespass even though he himself remained on board his ship and did not personally go into the house. So, if any of the defendants had themselves ordered or directed the alleged trespass now complained of by the plaintiffs, and it was in consequence of such order or direction that the alleged trespass took place, or if any of the defendants threatened to order or direct further trespass, then they could be sued. But in this case they could be sued not because, but in despite of the fact that they occupied official positions or acted as officials. In other words, to sum up shortly the result of the above by the use of convenient phraseology, the plaintiffs, in respect of the matters they are now complaining of, could sue any of the defendants individually for trespasses committed or threatened by them, but they could not sue the defendants officially or as an official body....

Note.—With this extract should be read the following extract from the judgment of Atkin L.J. in *Mackenzie-Kennedy v. Air Council*, [1927] 2 K. B. at p. 532:

‘I think that perhaps it might be more accurate to distinguish between a suit against a person in his individual capacity and in a representative capacity, for I cannot see that if you are in fact suing an individual on his personal liability it makes any difference whether you describe him as an official or not. If, however, you sue him as representing some interest or assets other than his own which you seek to bind by the action, it becomes very relevant how you describe him, for it may be found that as a representative he is not liable at all. And this is clearly true of a representative of the Crown who as such cannot be sued in tort. It is, of course, equally clear that individual servants of the Crown who themselves commit torts cannot escape liability by pleading the commands expressed or implied of the Crown. But sued as individuals they expose their own assets alone to liability in the event of judgment against them.’

BAINBRIDGE v. THE POSTMASTER-GENERAL, [1906] 1 K. B. 178

COURT OF APPEAL

COLLINS M.R.—This case comes before us by way of appeal from Walton J., and it arises under the following circumstances. A daughter of the first-named plaintiff was injured by reason, as she alleges, of the negligence of one Crane, who is a subordinate official of the Post Office; and the action was brought in the first instance in her name against Crane, charging him with the responsibility for the pain and damage sustained by her, through an accident arising out of his negligence in dealing with the laying of an electric wire. Afterwards her father was introduced, claiming damages consequent upon the loss of services and injury of his daughter, and a further amendment was made adding the Postmaster-General as defendant, and upon that addition the question to be decided arises. Application was made on the part of the Postmaster-General to have his name struck out on the ground that there was no cause of action against him.

The amendment states that the action is against the Postmaster-General in his corporate capacity under the statutes 26 & 27 Viet. c. 112, and 31 & 32 Viet. c. 110. The first of those Acts, the Telegraph Act, 1868, provides for the construction and maintenance of telegraphs, and a number of provisions are laid down applicable to the construction of telegraphs by companies. By s. 3, the definition of a company is: 'The term "the company" means any company to be hereafter authorized as aforesaid (hereinafter distinguished by the term "future company"), or any company already so authorized (hereinafter distinguished by the term "existing company").' Then follow provisions in s. 6 giving general powers to the company to execute works.

[*His Lordship specified these powers and also quoted s. 18.*]

Then comes s. 42, which is the one most relied upon in this case, which provides: 'The company shall be answerable for all accidents, damages, and injuries happening through the act or default of the company or of any person in their employment by reason or in consequence of any of the company's works, and shall save harmless all bodies having the control of streets or public roads, collectively and individually, and their officers and servants, from all damages and costs in respect of such accidents and injuries.'

That was the law regulating the companies who undertook the

duty of laying down telegraph wires, and subsequently the Act upon which the question in this case arises, namely, the Telegraph Act, 1868, was passed. The preamble is,

[*His Lordship quoted the preamble, ending with the words :*] 'it is expedient that Her Majesty's Postmaster-General be empowered to work telegraphs in connection with the administration of the Post Office.' Then it proceeds to enact, by s. 2: 'The Telegraph Act, 1863, shall be incorporated with this Act, except so far as the same, or any part thereof, may be expressly varied, altered, or be inconsistent with this Act; and the term "the company" in the Telegraph Act, 1863, shall, in addition to the meaning assigned to it in that Act, mean the Postmaster-General.' Then powers are given, by s. 4, to the Postmaster-General to purchase certain undertakings, and any undertaking and all other property purchased under the powers of the Act are vested in him in his corporate capacity. He is for certain purposes made a corporation. Something turned upon that in the course of the argument, but for the present I do not think I need refer further to that Act, because I have now not the essential conditions out of which the plaintiffs say the liability arises.

It is said that this action would have lain against the author of the wrong, the defendant Crane, and that it ought to lie against the person upon whose behalf and upon whose order Crane did the work. On looking at the legislation charging the Postmaster-General with the duty of dealing with telegraphs, we find that he is one of the persons who, under the Telegraph Act, must be taken to be charged with all the duties imposed upon the company in that Act, inasmuch as it has been directed by the section I have just read, that the Postmaster-General is to be added as within the meaning of the term 'company' in the Act. It is said that if into the 42nd section of the Act of 1863 there is read, 'the Postmaster-General' in addition to 'the company,' then it follows that the Postmaster-General is responsible for the acts of the subordinate, Crane, and that therefore there is a claim in damages against him in his corporate capacity.

That is the point which has been raised, and what we have got to see is whether the effect of that legislation is sufficient to fix the Postmaster-General in his official capacity (I prefer that word to his corporate capacity) with responsibility for the damage caused by the negligence of Crane. Now, apart from these enact-

ments, it seems to me to be perfectly clear law that he would not have been liable for the negligent act of a subordinate officer; and it is important to see upon what reasoning the conclusion was arrived at that the Postmaster-General would not be responsible for the act of a subordinate official, unless there were direct proof that he had ordered or directed the act to be done, if that act purported to be done on his behalf.

That question arose a long time ago, and the leading authority upon it is *Lane v. Cotton*, 1 *Ld. Raym.* 646; 12 *Mod.* 472, decided as far back as the year 1701. The side-note in that case is this: 'The head of a public office under Government with power to appoint and remove the servants of the office who are to be paid by, and give at his discretion security to Government is not responsible to an individual for a loss occasioned by the default of such servants. The servant who is guilty of the default is. The Postmaster-General is not answerable for a packet delivered to the receiver at the Post Office and lost out of the office.' Lord Holt differed from the opinion of the other judges, three in number, who decided that case, and when the case came up for discussion afterwards, in the time of Lord Mansfield, the whole Court adopted the judgment of the majority in that case, differing from the contrary opinion of Holt C.J.; and it seems to me that the principle upon which the majority acted was adopted and made the basis of the judgment in the subsequent case. Therefore I will refer shortly to the judgment of the majority in the earlier case in order to shew what was the principle upon which they arrived at their conclusion. Gould J., who is the first of the judges to give judgment, says, at p. 648 of the report: 'If anything can support this action, it must be a contract expressed or implied; but here is neither the one nor the other. The security of the dispatches depends upon the credit of the office, as founded upon the Act. Breese,' that is, the delinquent receiver, 'is as much an officer as the defendants, but they are more general officers. But Breese is the King's officer, and if there is any contract, it is between the plaintiff and Breese; which appears by the Act, which appoints several acts for all, and puts confidence in all. And therefore they resemble a community of officers acting in several trusts; and everyone shall answer for himself, not one for the act of another, as in case of a dean and chapter, 1 *Edward V.* 5 a. If the defendants had died, yet Breese would have continued officer;

and therefore Breese has a charge and trust of himself, and is not a deputy to the defendants.' Then Powys J. says, at p. 650 of the report: 'The defendants have not the power of the management of the office according to their discretion, but are subject to the control of the King and of the Treasury. And because the inferior officers are servants of the King, and not of the defendants, their wages being paid to them out of the revenue of the Post Office, and the security taken of them in the name of the King; and therefore it is unreasonable, that the defendants should be answerable for the acts of the inferior officers.' Then Turton J. gave judgment to the same effect, and the result is that, on the ground that there is no relation of master and servant, or principal and agent, between a subordinate officer of the Crown and his superior officer, it was held that the superior officer was not liable for the particular act in that case of his subordinate officer; and the same principle applies whether the claim be one in tort or in contract. Being all equally servants of the Crown, they are not servants of each other.

This decision came up for discussion in Lord Mansfield's time in the case of *Whitfield v. Lord Le Despencer*, (1778) 2 Cowp. 754, and the dissenting judgment of Holt C.J. was very closely canvassed, with the result that the Court adopted the decision of the other judges, and, as I think, clearly on the ground that I have indicated. The side-note is this: 'Case does not lie against the Postmaster-General, for a banknote stolen by one of the sorters out of a letter delivered into the Post Office.' Lord Mansfield says (2 Cowp. at p. 764): 'The Postmaster has no hire, enters into no contract, carries on no merchandise or commerce. But the Post Office is a branch of revenue, and a branch of police, created by Act of Parliament. As a branch of revenue, there are great receipts; but there is likewise a great surplus of benefit and advantage to the public, arising from the fund. As a branch of police, it puts the whole correspondence of the kingdom (for the exceptions are very trifling) under Government, and entrusts the management and direction of it to the Crown, and officers appointed by the Crown. There is no analogy therefore between the case of the Postmaster and a common carrier. The branch of revenue and the branch of police are to be governed by different officers. The superior has the appointment of the inferior officers; but they give security to the Crown. One requisite is that they shall take the

oaths taken by all public officers. Another strong guard is that they are made subject to heavy penalties.' A little lower down he says: 'If the man who receives a penny to carry the letters to the Post Office, loses any of them, he is answerable; so is the sorter in the business of his department. So is the Postmaster for any fault of his own. Here, no personal neglect is imputed to the defendants, nor is the action brought on that ground; but for a constructive negligence only, by the act of their servants. In order to succeed therefore it must be shewn, that it is a loss to be supported by the Postmaster, which it certainly is not. As to the argument that has been drawn from the salary which the defendants enjoy; in a matter of revenue and police under the authority of an Act of Parliament, the salary annexed to the office, is for no other consideration than the trouble of executing it. The case of the Postmaster, therefore, is in no circumstance whatever, similar to that of a common carrier,' to which Holt C.J. had likened him. He goes on at the end: 'If there could have been any doubt therefore before the determination of *Lane v. Cotton*, (1701) 1 Ld. Raym 646; 12 Mod. 472, the solemn judgment in that case having stood uncontroverted ever since puts the matter beyond dispute.'

Now, these passages which I have read shew that the Court adopted the reasoning of the authority in the earlier case and arrived at the conclusion that these subordinate officers are officers of the Crown, and not in the relation of servants to their superior officers.

That being so, I have to consider how far, if at all, the legislation that I have referred to in these Acts has altered the immunity of the Postmaster-General. We must look to see where any words are to be found in these Acts which would cut down or alter the position of the Postmaster-General in relation to telegraphs from that which his position would be with respect to his ordinary duties as Postmaster-General before he took over the telegraphs, and it seems to me that, when one analyses the sections which are supposed to import this liability, they leave the Postmaster-General where he was before. In his official capacity, he retains any immunity that he had before he was put into this section. The process by which he has been put in I have described, namely, by altering the definition of the word 'company' in the earlier Act of 1863. So now I take the obligation imposed in the 42nd

section of that Act, which is the one that is relied upon most, and I add the word 'Postmaster-General,' as I am told to do by virtue of that definition, and see whether, reading it with his name included, there is a liability imposed in this case. Sect. 42 so read is 'The Postmaster-General shall be answerable for all accidents, damages, and injuries happening through the act or default of the Postmaster-General or of any person in his employment by reason or in consequence of any of the Postmaster-General's works, and shall save harmless all bodies having the control of streets or public roads, collectively and individually, and their officers and servants, from all damages and costs in respect of such accidents and injuries.' That is the basis of the obligation.

It is not suggested here that the Postmaster-General had himself anything to do with this matter. If he can be reached at all, he must be reached upon the footing that Crane was in his employment. On the reasoning that I have pointed out in the cases which have been referred to, that condition is not fulfilled in this case. Crane was not in the employment of the Postmaster-General. He is a subordinate officer of the Crown, and, therefore, the nexus is at once broken between the Postmaster-General and Crane, and that is enough to dispose of this case.

But there are other difficulties in the way which might apply. The Postmaster-General is sued here in his official capacity. There is no provision in the sections of this Act, providing for any fund out of which damages should be paid by the Postmaster-General. The revenue of the country cannot be reached by an action against an official unless there is some provision to be found in the legislation to enable this to be done. There is clear authority for this proposition in the head-note in the case of *Palmer v. Hutchinson*, (1881) 6 App. Cas. 619, decided by the Privy Council on appeal from the Supreme Court of Natal. It is this: 'In a suit against Her Majesty's Deputy Commissary-General for Natal, and as such representing Her Majesty's Commissariat Department, to recover certain moneys as the price or hire of certain waggons and oxen, for the carriage of certain goods, for damages for illegal acts of defendant or his employes, and for general damage:—*Held*, on exceptions by the defendant to the jurisdiction of the Court and to the declaration, that the defendant could not be sued, either personally or in his official capacity, upon a contract entered into by him on behalf of the Commissariat Department; and that there

was no cause of action against him. The Government revenue cannot be reached by a suit against a public officer in his official capacity.'

I think the case is analogous to that which was before the Court in *Viscount Canterbury v. The Attorney-General*, (1842) 1 Ph. 806, at p. 824, for there the Lord Chancellor, Lord Lyndhurst, says: 'But then it is said, these officers are appointed by the Crown, and are removable at the pleasure of the Crown. That circumstance alone will not, I conceive, create any such liability. The Keeper of the Great Seal and other persons holding high situations in the State have authority to appoint to many offices, and also to remove the persons so appointed at their pleasure. But they are not, on that account, subject to make compensation for injury occasioned by the neglect or misconduct of the persons so appointed. The mere selection of the officers does not create a liability. But if the Crown would not be responsible for the act done, had it been done by the superiors, it follows that it cannot be held liable for the negligence of their subordinate agents whom they appoint and remove, and with the selection or control of whom the Crown has no concern.' That, of course, is not the point here, but the observation as to the relation of the persons nominated for appointment to the officials who nominate them is applicable to the present case.

On the whole, therefore, without going more in detail into the legislation, it seems to me on the authorities that I have cited that in this case the nexus of principal and agent, or master and servant, between the Postmaster-General and Crane, who is described as the Post Office sectional engineer for the Wigan district, is broken.

I will refer shortly to one or two more authorities. The point as to the liability of the Postmaster-General was raised in Ireland in *Jones v. Monsell*, (1872) Ir. Rep. 6 C. L. 155, the only case, I think, in which this particular Act has come under discussion. The question there was, whether the Postmaster-General in his personal, as distinguished from his official, capacity was liable. The Court came to the conclusion, in the first instance, that the action was brought against him not in his official, but in his individual capacity, and they pointed out that the section putting the Postmaster-General into the shoes of a company obviously dealt with the Postmaster-General only in his corporate capacity or in his official capacity, and not in his individual capacity. That was enough to determine that action against the applicant. The Court in that case left open the question what would have been

the rights of the parties had the defendant been sued in his official capacity, and they undoubtedly by some expressions in the case seem to think that incorporation is the cardinal distinction. There might be, I think, some extra difficulty if we were to make the question whether he was incorporated or not, the test of his liability. It seems to me he may well be and is for many purposes acting in his official capacity, although he has not been specially incorporated for that purpose. It is curious that the Legislature does incorporate him for certain special purposes, but, so far as I know, he is not incorporated for all purposes connected with his official work. Therefore, I do not rely upon what was suggested by the Attorney-General, basing himself on that case, that the Postmaster-General has not been incorporated for the purpose of being sued in actions such as this. I think, if incorporation were the test, it might well be contended that he has never been incorporated for such a purpose, and that, therefore, he must be treated as being sued not as an incorporated person, but in his private capacity. I do not think, however, that the argument would be good, for, in my view, the true meaning of this Irish case is not to make incorporation the test, but to emphasize the difference between what he does in his official capacity, and what he does in his capacity as a private individual, and, therefore, it seems to me that, although it were shewn that he was not incorporated, he might still be liable, if he could be liable, in his official capacity. I refer to that in order to mark that distinction.

The whole law as I have attempted to state it has been already stated by my brother Romer in a recent case of *Raleigh v. Goschen*, [1898] 1 Ch. 73, which clearly formulates the general proposition as to the immunity of public servants for acts done by their official subordinates unless a special mandate, or an adoption of the act purporting to be done on their behalf, is proved.

It seems to me, therefore, that the learned judge was wrong in not stopping the action as against the Postmaster-General, but I am bound to say that, although not expressly empowered now to refer a case to us, he seems to have done in this case very little more than to invite us to consider it—not giving any final or formal opinion himself. Our judgment, however, must take the form that we differ from his view, and the appeal must succeed.

MATHEW L.J. delivered judgment to the same effect.

Appeal allowed.

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MACBEATH v. HALDIMAND, (1786) 1 T. R. 172

KING'S BENCH

[The defendant, who was governor of Quebec, recommended the plaintiff to one Captain Sinclair as contractor for the supply of stores to the fort of Michilimakinac, of which Sinclair was in command. The latter was authorised to draw bills on the defendant in payment for stores supplied by the plaintiff. In pursuance of orders from Sinclair, the plaintiff furnished articles to a considerable amount, but when his bills, at the top of which was prefixed 'Government debtor to George Macbeath for sundries paid by order of Lieutenant-Governor Sinclair,' were sent to the defendant at Quebec, he made objections to several of the articles as being unreasonable, and furnished contrary to subsequent instructions. The bills which Sinclair drew in favour of the plaintiff were drawn on the defendant as governor and commander-in-chief. The plaintiff, finding that all these bills would not be accepted by the defendant, received a partial payment from him, with a proviso, that it should not prejudice his claim for the remainder; to recover which was the object of the present action.]

BULLER J., after reporting the above facts, said, that he had been of opinion at the trial, that, the goods in question having been supplied for the use of Government, and the defendant not having personally undertaken to pay, the plaintiff ought to be nonsuited. That it appeared to him that the plaintiff had acted with the defendant solely in the character of commander in chief, considering him as the agent of Government. That all the letters imported it to be a transaction on the part of Government: and that the accounts confirmed it. But the plaintiff's counsel appearing for their client when he was called, he left the question to the jury, telling them that they were bound to find for the defendant in point of law. And upon their asking him whether, in the event of the defendant's not being liable, any other person was, he told them that was no part of their consideration: but, being willing to give them any information, he added, that he was of opinion that, if the plaintiff's demand were just, his proper remedy was by petition of right to the Crown. On which they found a verdict for the defendant.

The rule for granting a new trial was moved for on the misdirection of the Judge upon two points. 1st, that the defendant

had by his own conduct made himself personally liable, which question should have been left to the jury. 2dly, that the plaintiff had no remedy against the Crown by a petition of right, on the supposition of which the jury had been induced to give their verdict.

Lord Mansfield now declared that the Court did not feel it necessary for them to give any opinion on the second ground. . . .

LORD MANSFIELD C.J.—The only question before the Court is, whether the defendant be liable or not in this action? If he be, the plaintiff must recover; if not, no consideration respecting the plaintiff's remedy against any other party can induce the Court to make him so. There is no colour to say that he is liable in his character of commander-in-chief. In a late case which was tried before me, where one Savage brought an action against Lord North, as first Lord of the Treasury, in order that he might be reimbursed the expenses which he had incurred in raising a regiment for the service of Government, I held that the action did not lie. So in another case of *Lutterloh* against *Halsey*, which was an action brought against the defendant, who was a commissary, for the supply of forage for the Army, and by whom the plaintiff had been employed in that service, the commissary was held not liable. In the present case it was notorious that the defendant did not personally contract; the plaintiff knew, at the time that he furnished the stores, that they were for the use of Government; and he afterwards made Government debtor in his bills. But it has been urged that the defendant made himself liable after the debt was contracted. In my opinion there is no ground for such an argument: the evidence does not warrant it. Then it was objected, that whether the defendant had made himself liable or not was a question which ought to have been left to the jury to decide. But there was no evidence which was proper for their consideration; for the evidence consisting altogether of written documents and letters which were not denied, the import of them was matter of law and not of fact. Therefore I am of opinion that the verdict should stand.

ASHHURST J.—In great questions of policy we cannot argue from the nature of private agreements. But even in these cases the question must be, what was the meaning of the parties at the time of entering into the contract? A person acting in the capacity of an agent may undoubtedly contract in such a manner as to

make himself personally liable; and that brings it to the true question here, namely, whether, from any thing that passed between the parties at the time, it was understood by them that the plaintiff was to rely upon the personal security of the defendant? But nothing appears from the evidence in this case to warrant such a conclusion. Government was made debtor; and it is evident that the plaintiff looked to them for payment: for he first made application to the Treasury, and his demand against the defendant was only an afterthought, when he found he could not obtain the money in any other way. Then it seems to me that there is nothing in this transaction to fix the defendant, or to shew that the plaintiff considered him as his debtor at the time that the credit was given. Great inconveniences would result from considering a governor or commander as personally responsible in such cases as the present. For no man would accept of any office of trust under Government upon such conditions. And indeed it has frequently been determined that no individual is answerable for any engagements which he enters into on their behalf. There is no doubt but the Crown will do ample justice to the plaintiff's demands if they be well founded.

WILLES and BULLER JJ. delivered judgments to the same effect.

Rule discharged.

GIDLEY v. LORD PALMERSTON, (1822) 3 Brod. & B. 275

COURT OF COMMON PLEAS

[The plaintiff was executor of Christopher Holland, deceased, who had been a war office clerk. On the 9th March, 1815, Holland retired with an allowance of 200*l.* a year. This allowance was regularly paid from the 9th March, 1815 to the 24th March, 1816, previously to which time Holland became embarrassed in his circumstances, and in consequence of certain pecuniary transactions of Holland, the defendant, who was secretary at war, and as such was head of the war office, directed that 50*l.* a year only of the retired allowance should be paid to him from the 25th March, 1816, and that the remainder should accrue as a fund for liquidating the claims of certain half-pay officers, widows and persons on the compassionate list, for whom Holland had acted as agent. The plaintiff sued to recover 350*l.* 10*s.*, the balance of the retired allowance which had not been paid to Holland.]

The mode in which the retired allowances granted to the retired clerks were provided for was as follows: Estimates of the money required were drawn up every year and laid before the House of Commons. Parliament voted the money and provided for its payment. The entire amount of the estimates of army services was, in the first instance, imprested from the Exchequer into the hands of the paymaster-general, to be applied as the secretary at war should direct. Then the secretary at war issued a warrant ordering the paymaster to pay the amount of the retired allowances to the first clerk of the war office, who paid it into his bank; the money, when so paid, was at the discretion of the secretary at war, no minute of the treasury being necessary to take it out. The sums retained out of the allowance to Holland had been since paid by the first clerk to the account of the paymaster-general at the bank of England.]

Upon the trial of the cause before Dallas C.J. at the sittings for *Middlesex* . . . a verdict was found for the Plaintiff with 850*l.* 10*s.* damages, subject to the opinion of the Court on the following case. . . .

DALLAS C.J. [*after stating the substance of the case, now gave judgment as follows:*] On these facts the question arises, whether, upon all or any of the counts in the declaration, the present action can be maintained: and we think that it cannot be maintained. It is not pretended that the Defendant is to be charged in respect of any express undertaking or agreement between him and the testator, or in respect of any other character than his public and official character of secretary at war. It is in that character, and in that only, that his duty is alleged to arise; being, therefore, a duty as between him and the Crown only, and not resulting from any relation to or employment by the Plaintiff, or under any undertaking in any way to be personally responsible to him. The money received is granted by the crown, subject only to the disposition or control of the Defendant, as the agent or officer of the crown, and responsible to the crown for the due execution of the trust or duty so committed. There is, therefore, no duty from which the law can imply a promise to pay to the testator during his life, or to his executors after his death, nor can money be said to have been had and received to the use of the testator, which money belonged to the crown, being received as the money of the crown, and the party receiving it being responsible only to the

crown in his public character. On this view of the case, it appears to us, that this action cannot be maintained.

But it must fail also on another and a wider ground. This is an action brought against the Defendant, as paymaster-general, for an alleged breach of an implied undertaking, said to attach upon him in that character.

With reference to this ground, it will be sufficient to advert to a class of cases, too well known and established to require to be more particularly mentioned, and which, in substance and result, have established, that an action will not lie against a public agent for any thing done by him in his public character or employment, although alleged to be, in the particular instance, a breach of such employment, and constituting a particular and personal liability; such persons, said Lord Mansfield, in one of the cases cited at the bar [*Macbeath v. Haldimand*, (1786) 1 T. R. 172], are not understood personally to contract; and in the same case it was observed, by Mr. Justice Ashhurst, 'In great questions of policy, we cannot argue from the nature of private agreements,'—'Great inconveniences would result from considering a governor or commander as personally responsible.'—'No man would accept of any office of trust under government upon such conditions; and, indeed, it has frequently been determined, that no individual is answerable for any engagements which he enters into on their behalf. There is no doubt but the crown will do ample justice to the plaintiff's demands, if they be well founded.' Mr. Justice Buller, in the same case, adds, 'Where a man acts as agent for the public, and treats in that capacity, there is no pretence to say that he is personally liable:' and, in a subsequent case [*Unwin v. Wolseley*, (1787) 1 T. R. 674], it is held, that a servant of the crown, contracting on the part of government, is not personally answerable. I am aware, that these cases are not, in their circumstances, precisely similar to the present; and, perhaps, in respect of some of the circumstances belonging to the present case, I may personally have doubted longer than, I am now satisfied, I ought to have done: but in their doctrine they go to this, that, on principles of public policy, an action will not lie against persons acting in a public character and situation, which, from their very nature, would expose them to an infinite multiplicity of actions, that is, to actions at the instance of any person who might suppose himself aggrieved: and though it is to be presumed that actions improperly

brought would fail, and it may be said that actions properly brought should succeed; yet, the very liability to an unlimited multiplicity of suits, would, in all probability, prevent any proper or prudent person from accepting a public situation at the hazard of such peril to himself.

It is scarcely necessary to add, even to guard against any possible misconception, that the noble Lord who is the Defendant on this record appears, in point of fact, to have acted upon the purest motives of public and private justice to all parties concerned.

Upon the grounds which I have stated we are of opinion, that this action cannot be maintained, and that the judgment, therefore, must be for the Defendant.

Judgment for the Defendant accordingly.

DYSON v. THE ATTORNEY-GENERAL, [1911] 1 K. B. 410

COURT OF APPEAL

[Under the Finance (1909–1910) Act, 1910, the Commissioners of Inland Revenue served a notice (commonly known as Form IV) on the plaintiff, requiring him to deliver certain returns within thirty days under a penalty not exceeding 50*l*. The plaintiff brought this action against the Attorney-General for a declaration that he was not under any obligation to comply with the said notice, such notice being ‘illegal, unauthorized, and ultra vires the said Act.’]

The Attorney-General thereupon took out a summons under Rules of Supreme Court, Order XXV., r. 4, to strike out the statement of claim as disclosing no reasonable cause of action, and Lush J., affirming a previous decision of the Master, made an order in the terms of the summons.

The plaintiff appealed.

FARWELL L.J.—Order XXV., r. 4, was never intended to apply to a case of this kind, and we might well have allowed the appeal on this ground alone, but the case raises a question of public importance, and as we have had it fully argued I think that we ought now to decide it.

The Attorney-General contends that he is not the proper defendant, that no such declaration as is asked could ever have been obtained in any Court against any defendant, and that, therefore, none such can now be obtained in the High Court, and

that the subject has no remedy, but can only defend actions for penalties when he is sued.

Now the action asks for no declaration in respect of any penalty; the complaint is that the Legislature has entrusted to a Government department (the Commissioners of Inland Revenue) the performance of the duty of making certain specific inquiries in a specific manner from landowners and of requiring answers to be sent to themselves, and has imposed a 50*l.* penalty for disobedience. The plaintiff alleges that the Commissioners have exceeded their powers by making inquiries not authorized to be made, by not giving proper time to answer, and by requiring answers to be sent to a person not authorized to receive them and to whom it is injurious to the plaintiff's interest to send them. This appeal has been heard as if it were on demurrer under the old practice, and the allegations must therefore be taken as true for the present purpose. It is obviously a question of the greatest importance; more than eight millions of Form IV. have been sent out in England, and the questions asked entail much trouble and in many cases considerable expense in answering; it would be a blot on our system of law and procedure if there is no way by which a decision on the true limit of the power of inquisition vested in the Commissioners can be obtained by any member of the public aggrieved, without putting himself in the invidious position of being sued for a penalty. I am, however, of opinion that the Attorney-General's contention is not well founded.

1. In a case like the present the Attorney-General is properly made defendant. It has been settled law for centuries that in a case where the estate of the Crown is directly affected the only course of proceeding is by petition of right, because the Court cannot make a direct order against the Crown to convey its estate without the permission of the Crown, but when the interests of the Crown are only indirectly affected the Courts of Equity, whether the Court of Chancery or the Exchequer on its Equity side (see *Deare v. Attorney-General*, (1835) 1 Y. & C. Ex. 197, at p. 208), could and did make declarations and orders which did affect the rights of the Crown. The two cases of *Paulett v. Attorney-General*, (1667) Hardres' Rep. 465, and *Hodge v. Attorney-General*, (1889) 3 Y. & C. Ex. 342, on the one hand and *Reeve v. Attorney-General*, (1741) 2 Atk. 223, on the other are good illustrations of the distinction. It has not, since the Commonwealth at any rate,

been the practice of the Crown to attempt to defeat the rights of its subjects by virtue of the prerogative; in 1667 Baron Atkyns in *Pawlett v. Attorney-General* (at p. 469) says: 'The party ought in this case to be relieved against the King; because the King is the fountain and head of justice and equity, and it shall not be presumed that he will be defective in either; it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him.' So too, in the case where a petition of right is required, that proceeding 'exists only for the purpose of reconciling the dignity of the Crown and the rights of the subject and to protect the latter against any injury arising from the acts of the former; but it is no part of its object to enlarge or alter those rights:' per Lord Cottenham in *Monckton v. Attorney-General*, (1850) 2 Mac. & G. 402, at p. 412. It is very unusual for the responsible minister to refuse to authorize the indorsement 'let right be done,' and it would be unjustifiable to refuse in any case where a plausible claim is made out. As Lord Langdale says in *Ryves v. Duke of Wellington*, (1846) 9 Beav. 579, at p. 600, 'I am far from thinking that it is competent to the King, or rather to his responsible advisers, to refuse capriciously to put into a due course of investigation any proper question raised on a petition of right.' The present is not a case for a petition of right at all; the Crown is not directly affected, but the plaintiff seeks a declaration from the Court of the true construction of an Act which imposes burdensome and expensive inquiries upon him, and for non-compliance with which he is threatened with fines. The argument on behalf of the Attorney-General admits for this purpose the illegality of the inquiries, but claims for a Government department a superiority to the law which was denied by the Court to the King himself in Stuart times.

2. Then it was argued that there is no precedent for such an order as is asked in this action. That may very well be, because before the Judicature Act the Court of Chancery would not make declarations of right where the plaintiff did not, or at any rate could not, ask for consequential relief. Order XXV., r. 5, has altered this, and declarations of right can now be obtained in cases where the Court of Chancery would have refused to make them. Then it was objected that the penalty made the neglect to answer the questions a criminal or quasi-criminal offence and that the Court of Chancery would not interfere in such a case,

and this may very well have been true before the Judicature Acts: *Prudential Assurance Co. v. Knott*, (1875) L. R. 10 Ch. 142; but it is otherwise since those Acts: *Bonnard v. Perryman*, [1891] 2 Ch. 269.

8. The next argument on the Attorney-General's behalf was 'ab inconvenienti'; it was said that if an action of this sort would lie there would be innumerable actions for declarations as to the meaning of numerous Acts, adding greatly to the labours of the law officers. But the Court is not bound to make declaratory orders and would refuse to do so unless in proper cases, and would punish with costs persons who might bring unnecessary actions: there is no substance in the apprehension, but if inconvenience is a legitimate consideration at all, the convenience in the public interest is all in favour of providing a speedy and easy access to the Courts for any of His Majesty's subjects who have any real cause of complaint against the exercise of statutory powers by Government departments and Government officials, having regard to their growing tendency to claim the right to act without regard to legal principles and without appeal to any Court. Within the present year in this Court alone there have been no less than three such cases. In *Rex v. Board of Education*, [1910] 2 K. B. 165, the Board, while abandoning by their counsel all argument that the Education Act, 1902, gave them power to pursue the course adopted by them, insisted that this Court could not interfere with them, but that they could act as they pleased. In *In re Weir Hospital*, [1910] 2 Ch. 124, the Charity Commissioners were unable to find any excuse or justification for the misapplication of 5000*l.* of the trust funds committed to their care. In *In re Hardy's Crown Brewery*, [1910] 2 K. B. 257, the Commissioners of Inland Revenue, who are entrusted by s. 2, sub-s. 1, of the Licensing Act, 1904, with the judicial duty of fixing the amount of compensation under the Act, fixed the sum *mero motu* without any inquiry or evidence and without giving the parties any opportunity of meeting objections, and claimed the right so to act without interference by any Court. Bray J. and the Court of Appeal held that they had acted unreasonably and ordered them to pay costs. In all these cases the defendants were represented by the law officers of the Crown at the public expense, and in the present case we find the law officers taking a preliminary objection in order to prevent the trial of a case which, treating the allegations as true

(as we must on such an application), is of the greatest importance to hundreds of thousands of His Majesty's subjects. I will quote the Lord Chief Baron in *Deare v. Attorney-General*, (1835) 1 Y. & C. Ex. at p. 208: 'It has been the practice, which I hope never will be discontinued, for the officers of the Crown to throw no difficulty in the way of proceedings for the purpose of bringing matters before a Court of justice when any real point of difficulty that requires judicial decision has occurred.' I venture to hope that the former salutary practice may be resumed. If ministerial responsibility were more than the mere shadow of a name, the matter would be less important, but as it is, the Courts are the only defence of the liberty of the subject against departmental aggression.

I agree that this appeal should be allowed, but it is only fair to the learned Judge to add that this is not a case which could be properly argued in chambers, and that his attention was not called to all the cases cited to us, but reliance was really placed on the passage in Mitford on Pleading, which is not quite accurate.

COZENS-HARDY M.R.— . . . The case of *Hodge v. Attorney-General*, (1899) 3 Y. & C. Ex. 342, is an important decision. I have examined the record, which fully bears out the report, with one exception. The plaintiffs were equitable mortgagees by deposit of the title deeds of certain leasehold premises. George Bailey, who had deposited the deeds, was convicted of felony, the result of which was that the legal title was vested in the Crown. The plaintiffs filed their bill in the Exchequer, making the Attorney-General sole defendant. It came on before Alderson B., 'sitting in equity,' as he himself stated. The Court declared the plaintiffs entitled to an equitable mortgage or lien, and referred it to the Master to take an account of what was due to the plaintiffs for principal, interest, and costs; and the decree proceeded to order, 'By consent of Her Majesty's Attorney-General,' that the plaintiffs should hold certain premises until they should be fully satisfied what the Master should find to be due to them, and the tenants were directed to attorn. This seems to me a distinct authority that the Court has jurisdiction to maintain an action against the Attorney-General as representing the Crown, although the immediate and sole object of the suit is to affect the rights of the Crown in favour of the plaintiffs. The only doubt raised in argument was due to the circumstance that the Crown had the legal

estate, and that the Crown could not be compelled to convey that legal estate. But Alderson B. in a considered judgment expressly held that he had jurisdiction to make a declaration and to direct an account, and also to decree that the plaintiffs should hold possession until they were repaid, although it is true that in the decree itself the last part of the relief, but not the earlier parts, was by the consent of the Attorney-General. So far as I can discover, the authority of *Hodge v. Attorney-General* has never been challenged, and I think it ought to be followed. It was suggested that there was something peculiar in the jurisdiction of the old Court of Exchequer which might account for such a decision. I cannot adopt this view. No doubt the Court of Exchequer on the Revenue side had peculiar functions which are not transferred by the Judicature Act to all branches of the High Court, but its equity jurisdiction had nothing peculiar as distinguished from the Court of Chancery, to which by statute this jurisdiction was transferred. What the old Court of Chancery could do can now be done by both Divisions of the High Court. . . .

FLETCHER MOULTON L.J. agreed, but solely on the ground that Order XXV., r. 4. had no application.

Appeal allowed.

VII

THE CROWN AND JUSTICE

THE King is the fountain of justice. So far the chief deduction which has been made from that maxim has been that the King cannot be sued in any Court against his will, for all Courts are the King's Courts. It falls now to consider the King, no longer as defendant, but as plaintiff, prosecutor, and judge.

And first of the King as plaintiff. He has at his disposal all the usual common law remedies, except such as are inconsistent with the royal prerogative and dignity (3 Bl. Com. 257-8). There exist also certain prerogative processes which are confined to the Crown. These are at the present day grouped together under the head of Crown Practice, and include, besides the Prerogative Writs of mandamus, &c., inquests of office, writs of extent, and informations. The advantage is purely procedural, and does not affect the substantive law as between sovereign and subject.¹ But it should be noticed that, except where there is a special statutory provision to the contrary, the Crown's right of action is not barred until sixty years have elapsed (9 Geo. 3, c. 16). The ordinary periods of limitation do not apply.

In England all prosecutions are in the King's name, but may be initiated by any private individual.² This is not the case in most countries, where all criminal proceedings are conducted by the State. But the Crown can intervene in a prosecution with decisive effect; the Attorney-General has, as representing the Crown, a prerogative right to enter a *nolle prosequi*, and so put an end to the proceedings (*Reg. v. Allen*, p. 274 below). On this form of intervention, A. L. Smith L.J. observed in *Reg. v. Comptroller-General of Patents*, [1899] 1 Q. B. at p. 914,

'Another case in which the Attorney-General is pre-eminent is the power to enter a *nolle prosequi* in a criminal case. I do not say that when a case is before a judge a prosecutor may not ask the judge to allow the case to be withdrawn, and the judge may do so if he is

¹ Note the modifications suggested in the Crown Proceedings Committee Report (H.M.S.O. *Cmd.* 2842, 1927).

² Subject in some few cases to his obtaining the consent of the Attorney-General or other executive officer.

satisfied that there is no case; but the Attorney-General alone has power to enter a *nolle prosequi*, and that power is not subject to any control.'

Not only can the Crown by means of a *nolle prosequi* stop a criminal prosecution initiated by a subject; it has also the undoubted prerogative of pardon. Hence the battles of the constitution have been fought more often in the civil than in the criminal Courts, for from the time of Bracton, and even Glanvil, the King has had no right of interfering so as to deprive the subject of his civil action.

'Non enim poterit rex gratiam facere cum injuria et damno aliorum. Poterit quidem dare quod suum est, hoc est pacem suam, quam utlagatus amisit propter fugam et suam contumaciam, quod autem alienum est, dare non potest per suam gratiam.' Bracton, lib. 3, f. 132 b.

'Forisfacturam autem et utlagariam solet dominus Rex damnatis remittere, nec tamen aliena Jura ideo quaerit infringere.' Glanvil, lib. 7, cap. 17.

There is, however, one form of criminal proceeding with which the Crown is powerless to interfere, namely, impeachment, for the Act of Settlement (12 & 13 Wm. 3, c. 2) enacts

'That no Pardon under the Great Seal of England be pleadable to an Impeachment by the Commons in Parliament.'

Note that this does not oust the King's Prerogative of pardon after sentence.

For the procedure in Impeachment, see Anson on Parliament (5th ed.), 384-8.

The Courts are the King's Courts, but, whether Coke is right or not in saying that 'no King after the conquest assumed to himself to give any judgment in any cause whatsoever', and he is probably not, the decision of the judges in the case of *Prohibitions del Roy* (p. 276 below) eventually proved decisive. The King himself cannot act as judge.

And the fountain of justice has all but dried up. The Privy Council case of *In re Lord Bishop of Natal* (p. 278 below) clothed with judicial authority the doctrine found in the old books, that the King by his Prerogative cannot establish a court to administer any but the Common Law, and as such a court would nowadays be almost useless, it is very unlikely that this prerogative will be

exercised. The rule in *In re Lord Bishop of Natal* is of very great importance, for it precludes the establishment of prerogative courts capable of developing a system of law in conflict with the Common Law, such as Star Chamber was. It seems that the prohibition applies to courts of Equity, though at the present day there can be no need for apprehension from that quarter.

CASES

REG. v. ALLEN, (1862) 1 B. & S. 850

QUEEN'S BENCH

Indictment charged that the defendant, on the 18th September instant, at the Custom House, in the city of London, unlawfully, wilfully, knowingly and corruptly did give certain false evidence on his examination on oath before Ralph William Grey Esq., one of the Commissioners of Her Majesty's Customs, then conducting a certain inquiry under and in pursuance of sect. 38 of The Supplemental Customs Consolidation Act, 1855 (18 & 19 Vict. c. 96), and thereby unlawfully and knowingly did commit wilful and corrupt perjury, contrary to the statute, &c.

A true bill having been found at the October Sessions of the Central Criminal Court in 1861, the indictment was removed into this Court by certiorari at the instance of the defendant; and, on the 26th November following, a nolle prosequi was entered in pursuance of an order of the Attorney-General, addressed to the Queen's coroner and attorney; which, after reciting that an indictment had been found at the Central Criminal Court against the defendant for alleged perjury, which was removed by certiorari into this Court, proceeded:

'And whereas it is deemed advisable that a nolle prosequi should be entered to the said indictment. These are therefore to authorize and require you to enter, or cause to be entered, a nolle prosequi to the said indictment.

'Dated this 26th day of November, 1861.

'W. ATHERTON.'

J. J. Powell, on behalf of the prosecutor, moved, upon affidavits, for a rule calling upon the defendant to shew cause why the prosecutor should not be at liberty to proceed to the trial of the indictment, notwithstanding the nolle prosequi.

COCKBURN C.J.—I am of opinion that there ought to be no rule in this case. It is an undoubted power of the Attorney General, as representative of the Crown in matters of criminal judicature, to enter a nolle prosequi, and thereby to stay proceedings in any

indictment or criminal proceeding. No instance has been cited, and therefore it may be presumed that none can be found, in which, after a nolle prosequi has been entered by the fiat of the Attorney General, this Court has taken upon itself to award fresh process or has allowed any further proceedings to be taken on the indictment. Nor, if the Court were to take that unprecedented course, is there anything to prevent the Attorney General from entering a nolle prosequi toties quoties. It is not for us to create a precedent which is contrary to the established practice, and which would be fraught with great inconvenience. Our attention has been called to the practice of Attorney General in his office, as laid down in the books, to summon the prosecutor, and hear the parties before granting his fiat for a nolle prosequi. I think that is a wholesome practice; and generally the law officer of the Crown, before entering a nolle prosequi either ex mero motu or at the instance of the defendant, and thereby debarring the prosecutor from proceeding further, would act wisely in calling the prosecutor before him; but, from particular circumstances known to him, or from the nature of the charge, he may feel called upon to grant his fiat for a nolle prosequi without adopting that course. Suppose it possible that there could be an abuse of his power by the Attorney General, or injustice in the exercise of it, the remedy is by holding him responsible for his acts before the great tribunal of this country, the High Court of Parliament. I have no doubt that the Attorney General has this power; and this Court has never interfered with it.

CROMPTON J.—It would be very mischievous, by granting a rule nisi, to raise any doubt in so clear a matter. In this country, where private individuals are allowed to prefer indictments in the name of the Crown, it is very desirable that there should be some tribunal having authority to say whether it is proper to proceed farther in a prosecution. That power is vested by the constitution in the Attorney General, and not in this Court. . . .

BLACKBURN and MELLOR JJ. delivered short concurring judgments.

Rule refused.

PROHIBITIONS DEL ROY, (1607) 12 Co. Rep. 68

Note, upon Sunday the 10th of November in this same term, the King, upon complaint made to him by Bancroft, Archbishop of Canterbury, concerning prohibitions, the King was informed, that when the question was made of what matters the Ecclesiastical Judges have cognizance, either upon the exposition of the statutes concerning tithes, or any other thing ecclesiastical, or upon the statute 1 El. concerning the high commission or in any other case in which there is not express authority in law, the King himself may decide it in his Royal person; and that the Judges are but the delegates of the King, and that the King may take what causes he shall please to determine, from the determination of the Judges, and may determine them himself. And the Archbishop said, that this was clear in divinity, that such authority belongs to the King by the word of God in the Scripture. To which it was answered by me, in the presence, and with the clear consent of all the Judges of England, and Barons of the Exchequer, that the King in his own person cannot adjudge any case, either criminal, as treason, felony, &c., or betwixt party and party, concerning his inheritance, chattels, or goods, &c., but this ought to be determined and adjudged in some Court of Justice, according to the law and custom of England; and always judgments are given, *ideo consideratum est per Curiam*, so that the Court gives the judgment; and the King hath his Court, viz. in the Upper House of Parliament, in which he with his Lords is the supreme Judge over all other Judges; for if error be in the Common Pleas, that may be reversed in the King's Bench; and if the Court of King's Bench err, that may be reversed in the Upper House of Parliament, by the King, with the assent of the Lords Spiritual and Temporal, without the Commons: and in this respect the King is called the Chief Justice, 20 H. 7. 7 a. by Brudnell: and it appears in our books, that the King may sit in the Star-Chamber; but this was to consult with the justices, upon certain questions proposed to them, and not *in judicio*: so in the King's Bench he may sit, but the Court gives the judgment: and it is commonly said in our books, that the King is always present in Court in the judgment of law; and upon this he cannot be nonsuit: but the judgments are always given *per Curiam*; and the Judges are sworn to execute justice according to law and the custom of England. And it appears by the Act of

Parliament of 2 Ed. 3. cap. 9. 2 Ed. 3. cap. 1. that neither by the Great Seal, nor by the Little Seal, justice shall be delayed; *ergo*, the King cannot take any cause out of any of his Courts, and give judgment upon it himself, but in his own cause he may stay it, as it doth appear 11 H. 4. 8. And the Judges informed the King, that no King after the Conquest assumed to himself to give any judgment in any cause whatsoever, which concerned the administration of justice within this realm, but these were solely determined in the Courts of Justice: and the King cannot arrest any man, as the book is in 1 H. 7. 4. for the party cannot have remedy against the King; so if the King give any judgment, what remedy can the party have. *Vide* 39 Ed. 3. 14. one who had a judgment reversed before the Council of State; it was held utterly void for that it was not a place where judgment may be reversed. *Vide* 1 H. 7. 4. Hussey Chief Justice, who was attorney to Ed. 4. reports that Sir John Markham, Chief Justice, said to King Ed. 4. that the King cannot arrest a man for suspicion of treason or felony, as others of his lieges may; for that if it be a wrong to the party grieved, he can have no remedy: and it was greatly marvelled that the archbishop durst inform the King, that such absolute power and authority, as is aforesaid, belong to the King by the word of God. *Vide* 4 H. 4. cap. 22. which being translated into Latin, the effect is, *judicia in Curia Regis reddita non annihilentur, sed stet judicium in suo robore quousque per judicium Curie Regis tanquam erroneum, &c. vide West. 2. cap. 5. Vide le stat. de Marbridge, cap. 1. Provisum est, concordatum, et concessum, quod tam majores quam minores justitiam habeant et recipiant in Curia domini Regis, et vide le stat. de Magna Charta, cap. 29. 25 Ed. 3. cap. 5. None may be taken by petition or suggestion made to our lord the King or his Council, unless by judgment: and 43 Edw. 3. cap. 3. no man shall be put to answer without presentment before the justices, matter of record, or by due process, or by writ original, according to the ancient law of the land: and if any thing be done against it, it shall be void in law and held for error. *Vide* 28 Edw. 3. c. 3. 37 Edw. 3. cap. 18. *Vide* 17 R. 2. *ex rotulis Parliamenti in Turri, art. 10.* A controversy of land between parties was heard by the King, and sentence given, which was repealed for this, that it did belong to the common law: then the King said, that he thought the law was founded upon reason, and that he and others had reason, as well as the Judges: to which*

it was answered by me, that true it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden met-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said, that Bracton saith, *quod Rex non debet esse sub homine, sed sub Deo et lege*.

IN RE LORD BISHOP OF NATAL, (1864-5) 3 Moo. P. C. C. (N.S.) 115

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

[In 1847 the District of Natal was completely separated from Cape Colony and given an independent legislature, and in 1850 a Parliament was granted to Cape Colony. In 1847 the Queen had by letters patent created the diocese of Cape Town, but in 1858 the diocese was divided into three, Dr. Gray, the Respondent, being appointed Bishop of Cape Town, and Dr. Colenso, the Appellant, Bishop of Natal. By letters patent the Queen purported to give to the Bishop of Cape Town, as Metropolitan, full authority and jurisdiction over the other two bishops and over all inferior clergy within the province. The letters patent by which Dr. Colenso was appointed Bishop of Natal ordained that he should be subject to the see of Cape Town and should take the oath of canonical obedience to its bishop. This he did on his consecration.

In 1868 the Appellant was charged before the Respondent with heresy, convicted, and deposed from his bishopric. The Appellant protested against the assumption of jurisdiction by the Respondent and presented a petition to Her Majesty in Council, complaining of the illegality of the proceedings. This petition was specially referred by Her Majesty to the Judicial Committee.]

The judgment of the Judicial Committee was delivered by

LORD CHELMSFORD L.C. [*His Lordship reviewed the facts and continued:*] In this state of things three principal questions arise, and have been argued before us: First, were the Letters Patent of

the 8th of December, 1853, by which Dr. Gray was appointed Metropolitan, and a Metropolitan See or Province was expressed to be created, valid and good in law? Secondly, supposing the ecclesiastical relation of Metropolitan and Suffragan to have been created, was the grant of coercive authority and jurisdiction expressed by the Letters Patent to be thereby made to the Metropolitan valid and good in law? Thirdly, can the oath of canonical obedience taken by the Appellant to the Bishop of Cape Town, and his consent to accept his See as part of the Metropolitan Province of Cape Town, confer any jurisdiction or authority on the Bishop of Cape Town by which this sentence of deprivation of the Bishopric of Natal can be supported?

With respect to the first question, we apprehend it to be clear, upon principle, that after the establishment of an independent Legislature in the Settlements of the Cape of Good Hope and Natal, there was no power in the Crown by virtue of its Prerogative (for these Letters Patent were not granted under the provisions of any Statute) to establish a Metropolitan See or Province, or to create an Ecclesiastical Corporation whose *status*, rights, and authority the Colony could be required to recognize.

After a Colony or Settlement has received legislative institutions, the Crown (subject to the special provisions of any Act of Parliament) stands in the same relation to that Colony or Settlement as it does to the United Kingdom.

It may be true that the Crown, as legal head of the Church, has a right to command the consecration of a Bishop, but it has no power to assign him any Diocese, or give him any sphere of action within the United Kingdom. The United Church of England and Ireland is not a part of the constitution in any Colonial Settlement, nor can its authorities or those who bear office in it claim to be recognized by the law of the Colony, otherwise than as the members of a voluntary association.

The course which legislation has taken on this subject is a strong proof of the correctness of these conclusions. In the year 1818 it was deemed expedient to establish a Bishopric in the East Indies (then under the Government of the East India Company), and although the Bishop was appointed and consecrated under the authority of the Crown, yet it was thought necessary to obtain the sanction of the Legislature, and that an Act of Parliament should be passed to give the Bishop legal *status* and authority.

[*A statute was accordingly passed for that purpose and subsequently similar statutes were passed to confer ecclesiastical jurisdiction on the new bishops of Madras and Bombay. In Jamaica the same result was attained by Act of the Colonial Legislature. The consent of the Crown was given to this Colonial Act, which would have been improper, had it not been a necessary measure. And every new English bishopric since the Reformation has been created with the aid of an Act of Parliament.*]

We, therefore, arrive at the conclusion that although in a Crown Colony, properly so called, or in cases where the Letters Patent are made in pursuance of the authority of an Act of Parliament (such for example as the Act of the 6th and 7th Vict., c. 18), a Bishopric may be constituted and Ecclesiastical jurisdiction conferred by the sole authority of the Crown, yet that the Letters Patent of the Crown will not have any such effect or operation in a Colony or Settlement which is possessed of an independent legislature.

The subject was considered by the Judicial Committee in the case of *Long v. The Bishop of Cape Town*, (1868) 1 Moo. P. C. C. (N.S.) 411, and we adhere to the principles which are there laid down.

The same reasoning is of course decisive of the second question, whether any jurisdiction was conferred by the Letters Patent. Let it be granted or assumed that the Letters Patent are sufficient in law to confer on Dr. Gray the Ecclesiastical *status* of Metropolitan, and to create between him and the Bishops of Natal and Graham's Town the personal relation of Metropolitan and Suffragan as Ecclesiastics, yet it is quite clear that the Crown had no power to confer any jurisdiction or coercive legal authority upon the Metropolitan over the Suffragan Bishops, or over any other person.

It is a settled constitutional principle or rule of law, that although the Crown may by its Prerogative establish Courts to proceed according to the Common Law, yet that it cannot create any new Court to administer any other law; and it is laid down by Lord Coke in the 4th Institute, that the erection of a new Court with a new jurisdiction cannot be without an Act of Parliament.

It cannot be said that any Ecclesiastical Tribunal or jurisdiction is required in any Colony or Settlement where there is no Established Church, and in the case of a settled Colony the Ecclesiastical Law of England cannot, for the same reason, be treated as part

of the law which the settlers carried with them from the mother country.

So much of the Letters Patent now in question as attempts to confer any coercive legal jurisdiction is also in violation of the law as declared and established by that part of the Act of the 16th Car. I., c. 11, which remains unrepealed by the 18th Car. II. St. II., c. 12. It may be useful to state this in detail. By the 16th and 17th sections of the 1 Eliz., c. 1, entitled 'An Act to restore to the Crown the ancient Jurisdiction over the Estate Ecclesiastical and Spiritual, and abolishing all Foreign Powers repugnant to the same,' it was enacted, that all usurped and Foreign power and authority, spiritual and temporal, should for ever be extinguished within the Realm, and, that such jurisdictions, privileges, superiorities, and pre-eminences, spiritual and ecclesiastical, as by any spiritual or ecclesiastical power or authority had theretofore been, or might lawfully be exercised or used for the visitation of the Ecclesiastical state and persons, and for reformation, order, and correction of the same, and of all manner of errors, heresies, schisms, abuses, offences, contempts and enormities, should for ever be united and annexed to the Imperial Crown of this Realm. And by the 18th section the Queen was empowered by Letters Patent to appoint persons to exercise, occupy, use, and execute all manner of Spiritual or Ecclesiastical jurisdiction within the realms of England and Ireland, or any other the dominions and countries of the Crown.

Under this Statute the High Commission Court was erected, which was abolished by the 16th Car. I., c. 10.

By the Act of the 16th Car. I., c. 11, the 18th section of the 1 Eliz., c. 1, was wholly repealed, and by the 4th section of the same Statute all spiritual and ecclesiastical persons or Judges were forbidden under severe penalties to exercise any jurisdiction or coercive legal authority, an enactment which closed all the regular Established ecclesiastical Tribunals; but by the 18th Car. II., c. 12, the ordinary Ecclesiastical jurisdiction and authority, as it existed before the year 1689, was with certain savings restored to the Archbishops and Bishops; and the Act of the 16th Car. I., excepting what concerned the High Commission Court or the erection of any such like Court by Commission, was repealed, but with a proviso that nothing should extend or be construed to revive or give force to the enactments contained in

the 18th section of the 1 Eliz., c. 1, which should remain and stand repealed.

There is, therefore, no power in the Crown to create any new or additional ecclesiastical Tribunal or jurisdiction, and the clauses which purport to do so, contained in the Letters Patent to the Appellant and Respondent, are simply void in law. No Metropolitan or Bishop in any Colony having legislative institutions can, by virtue of the Crown's Letters Patent alone (unless granted under an Act of Parliament, or confirmed by a Colonial Statute), exercise any coercive jurisdiction, or hold any Court or Tribunal for that purpose.

Pastoral or spiritual authority may be incidental to the office of Bishop, but all jurisdiction in the Church, where it can be lawfully conferred, must proceed from the Crown, and be exercised as the law directs, and suspension or privation of office is matter of coercive legal jurisdiction, and not of mere spiritual authority.

Third. If, then, the Bishop of Cape Town had no jurisdiction by law, did he obtain any by contract or submission on the part of the Bishop of Natal?

There is nothing on which such an argument can be attempted to be put, unless it be the oath of canonical obedience, taken by the Bishop of Natal to Dr. Gray as Metropolitan.

The argument must be, that both parties being aware that the Bishop of Cape Town had no jurisdiction or legal authority as Metropolitan, the Appellant agreed to give it to him by voluntary submission.

But even if the parties intended to enter into any such agreement (of which, however, we find no trace), it was not legally competent to the Bishop of Natal to give, or to the Bishop of Cape Town to accept or exercise, any such jurisdiction.

There remains one point to be considered. It was contended before us that if the Bishop of Cape Town had no jurisdiction, his judgment was a nullity, and that no appeal could lie from a nullity to Her Majesty in Council.

[Their Lordships dismissed this point and gave judgment for the Appellant.]

VIII

ALLEGIANCE

EVERY one who enjoys the protection of the Crown owes in return the duty of allegiance. British subjects, who are under that protection wherever they may be, owe that duty everywhere; the alien resident in British territory owes a local allegiance while he continues to reside there. These are old and familiar principles of English law.

What is a British subject? At common law, the law on this point was governed by the maxim *nemo potest exuere patriam*. He who was born under the King's protection was a natural-born subject; none was a subject of the King unless he was born under his protection. In Coke's words,

'It is *nec cælum, nec solum*, neither the climate nor the soil, but *ligeantia* and *obedientia* that make the subject born; for if enemies should come into the realm, and possess town or fort, and have issue there, that issue is no subject to the King of England, though he be born upon his soil, and under his meridian, for that he was not born under the ligeance of a subject, nor under the protection of the King.' (*Calvin's Case*, (1608) 7 Co. Rep. 6 a.)

Once acquired, the character of subject was indelible. There were no means whereby the bond of allegiance could be dissolved. It was unaffected by the subject's departure out of the King's dominions, even though he attempted to be naturalized in a foreign state; and it was still arguable, until the recognition of American independence raised insuperable difficulties of a practical kind, that allegiance remained when the territory in which a subject lived ceased to belong to the English Crown.

At common law therefore neither King nor subject could create or end this relationship by any act of his own. The King, it is true, might by his Prerogative issue letters of denization to an alien enabling him to acquire land and to sue in the Courts, but no rights in public law were thus conferred on him, and even in private law his rights were less than those of the natural-born subject. To confer the rights of a natural-born subject on one who did not at birth possess them required the intervention of Parliament. The common law principle that none was a subject of the King save him who was born under his protection was wide enough to allow the judges in

Calvin's Case to hold that persons born in Scotland after the accession of James I to the English throne (the *post-nati*) could not be accounted aliens in England, but it excluded all those born before that date (the *ante-nati*), and while the decision became most important as the Crown's dominions grew in extent, since it meant that at common law the same status attached to natural-born subjects in all parts of them, it did nothing to extend that status to those who were not born into it. Even children born of English parents but outside the King's dominions did not at common law enjoy the rights of the natural-born subject, and had to be legislated for, though this was done by a general Act affecting them as a class. By the end of the eighteenth century a man born within the King's dominions had been enabled to transmit the rights of a natural-born subject to children, and even grandchildren, who were born outside them, though the rule was subject to exceptions. For the alien there was, save for a short-lived and unpopular Act for the naturalization of foreign Protestants passed in 1708 (7 Anne, c. 5), no resource except the passing of a special Act in each individual case. For a general power granted to the Crown to naturalize aliens, as well as for means by which the subject could divest himself of his allegiance, we have to wait until the nineteenth century. In 1844 (7 & 8 Vict., c. 66) the Crown was empowered to naturalize aliens who had resided in Great Britain for five years, though such naturalization did not yet confer full political rights. The process and effects of naturalization were still further defined and enlarged by the Naturalization Act, 1870 (33 Vict., c. 14), which also, and for the first time, enabled a subject to renounce his allegiance.

The present law is virtually codified in the British Nationality and Status of Aliens Acts, 1914-22. These Acts regulate not only the status of natural-born British subjects, but also the acquisition and loss of British nationality by marriage and by naturalization. The following sections of the Acts explain themselves.

PART I

NATURAL-BORN BRITISH SUBJECTS

1.—(1) The following persons shall be deemed to be natural-born British subjects, namely:—

(a) Any person born within His Majesty's dominions and allegiance; and

(b) Any person born out of His Majesty's dominions whose father was, at the time of that person's birth, a British subject, and who fulfils any of the following conditions, that is to say, if either—

(i) his father was born within His Majesty's allegiance; or

(ii) his father was a person to whom a certificate of naturalization had been granted; or

(iii) his father had become a British subject by reason of any annexation of territory; or

(iv) his father was at the time of that person's birth in the service of the Crown; or

(v) his birth was registered at a British consulate within one year or in special circumstances, with the consent of the Secretary of State, two years after its occurrence, . . . and

(c) Any person born on board a British ship whether in foreign territorial waters or not:

Provided that the child of a British subject, whether that child was born before or after the passing of this Act, shall be deemed to have been born within His Majesty's allegiance if born in a place where by treaty, capitulation, grant, usage, sufferance, or other lawful means, His Majesty exercises jurisdiction over British subjects;

Provided also that any person whose British nationality is conditional upon registration at a British consulate shall cease to be a British subject unless within one year after he attains the age of twenty-one, or within such extended period as may be authorised in special cases by regulations made under this Act—

(i) he asserts his British nationality by a declaration of retention of British nationality, registered in such manner as may be prescribed by regulations made under this Act; and

(ii) if he is a subject or citizen of a foreign country under the law of which he can, at the time of asserting his British nationality, divest himself of the nationality of that foreign country by making a declaration of alienage or otherwise, he divests himself of such nationality accordingly.

(2) A person born on board a foreign ship shall not be deemed to be a British subject by reason only that the ship was in British territorial waters at the time of his birth. . . .

PART II

NATURALIZATION OF ALIENS

2.—(1) The Secretary of State may grant a certificate of naturalization to an alien who makes an application for the purpose, and satisfies the Secretary of State—

- (a) that he has either resided in His Majesty's dominions for a period of not less than five years in the manner required by this section, or been in the service of the Crown for not less than five years within the last eight years before the application; and
- (b) that he is of good character and has an adequate knowledge of the English language; and
- (c) that he intends if his application is granted either to reside in His Majesty's dominions or to enter or continue in the service of the Crown.

(2) The residence required by this section is residence in the United Kingdom for not less than one year immediately preceding the application, and previous residence, either in the United Kingdom or in some other part of His Majesty's dominions, for a period of four years within the last eight years before the application.

(3) The grant of a certificate of naturalization to any such alien shall be in the absolute discretion of the Secretary of State, and he may, with or without assigning any reason, give or withhold the certificate as he thinks most conducive to the public good, and no appeal shall lie from his decision.

(4) A certificate of naturalization shall not take effect until the applicant has taken the oath of allegiance. . . .

(6) For the purposes of this section a period spent in the service of the Crown may, if the Secretary of State thinks fit, be treated as equivalent to a period of residence in the United Kingdom. . . .

Loss of British Nationality.

13. A British subject who, when in any foreign state and not under disability, by obtaining a certificate of naturalization, or by any other voluntary and formal act, becomes naturalized therein, shall thenceforth be deemed to have ceased to be a British subject.

14.—(1) Any person who by reason of his having been born within His Majesty's dominions and allegiance or on board a British ship is a natural-born British subject, but who at his birth or during his minority became under the law of any foreign state a subject also of that state, and is still such a subject, may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject.

(2) Any person who though born out of His Majesty's dominions is a natural-born British subject may, if of full age and not under disability, make a declaration of alienage, and on making the declaration shall cease to be a British subject. . . .

16. Where any British subject ceases to be a British subject, he shall not thereby be discharged from any obligation, duty or liability in respect of any act done before he cease to be a British subject.

Special provisions regulate the acquisition and loss of British nationality by infants and married women.

The Secretary of State may include in a grant of naturalization all infant children of the grantee, and if a British subject loses his British nationality, his infant children (save in the special case provided for in s. 12 (1) of the Act) lose British nationality likewise. But in either case the infant may, on reaching his majority, resume his former nationality, while if his mother by marrying a second time becomes an alien, he never loses his British nationality.

A married woman usually takes the nationality of her husband; but for the past few years it has been possible for a married woman who is a British subject to retain her British nationality although her husband ceases during the continuance of the marriage to be a British subject; and where a woman who was a British subject at birth marries an alien and war subsequently breaks out between this country and the state of which she has become a subject, the Secretary of State may, if he thinks it desirable, grant her a certificate of naturalization.

A woman who has changed her nationality by marrying a subject of another state, does not on the death of her husband or the dissolution of her marriage regain *ipso facto* her former nationality, but if she was at the date of the marriage a British subject, she may be renaturalized at once, without waiting for the normal period.

The wide—one might almost say, autocratic—power of the Secretary of State should be particularly noticed. In addition to the powers contained in the sections just cited he has also power to make regulations for the carrying into effect of the objects of the Acts, any regulation so made to be of the same force as if it had been enacted in the Acts themselves. He is also under a duty to revoke any certificate of naturalization (1) where he is satisfied that it has been obtained by fraud or similar misconduct, or where the holder of the certificate has shown disloyalty to the Crown;

(2) where he is satisfied that the holder (a) has assisted an enemy state at war with this country, or (b) has within five years of the grant of the certificate been sentenced by a British Court to imprisonment for not less than twelve months or to penal servitude or to a fine of not less than £100, or (c) was not of good character at the date of the grant of the certificate, or (d) has by long residence in foreign parts lost substantial connexion with the King's dominions, or (e) remains according to the law of a state at war with His Majesty a subject of that state. In all the cases comprised within (2) he must also be satisfied that the continuance of the certificate is not conducive to the public good. This in effect gives him a very wide discretion whether to revoke the certificate or not, and *Ex parte Venicoff* (p. 144 above) is an authority for the proposition that his discretion is an executive discretion, not subject to control by a court of law.

It should never be forgotten that the grant of a certificate of naturalization is always in the absolute discretion of the Secretary of State.

One of the main objects of the Acts was to render possible the creation of a common status of naturalized British subject, uniform throughout the Empire. With that end in view powers analogous to those of the Secretary of State were given to the governments of all British Possessions, with the proviso that, except in the case of the self-governing Dominions and India, the exercise of those powers should be subject to the approval of the Secretary of State. Moreover, this part of the Act is not to apply to any of the self-governing Dominions until it has been adopted by the legislature of the Dominion, and the legislature may also rescind the adoption whenever it pleases.

Apart from this provision, the Dominions are still at liberty to grant a certificate of naturalization, to operate only within the Dominion,¹ and power is expressly reserved to them to treat differently different classes of British subjects. It should also be

¹ Cf. *R. v. Francis; Ex parte Markwald*, [1918] 1 K. B. 617, and *Markwald v. A.-G.*, [1920] 1 Ch. 348, where it was held that the grant of a certificate of naturalization under the Australian Act No. 11 of 1903 did not operate to confer the rights of a British subject except within the Commonwealth of Australia, and that the recipient was therefore an alien within the United Kingdom, notwithstanding he had, *semble*, lost his original Prussian nationality. *Quære*, was he stateless, save within the Commonwealth of Australia? This is not impossible, for the notion of statelessness is not unknown to English law; see *Stoeck v. Public Trustee*, [1921] 2 Ch. 67.

noticed that the Act does not operate to enable an alien to hold real property situate out of the United Kingdom.

With this and certain other comparatively unimportant exceptions, an alien now enjoys all the private rights of a subject, but he has no public rights. Nevertheless, if he is a resident alien, he owes a local allegiance. This, in effect, means little more than that he can while he is within the realm be guilty of treason, the one crime against the allegiance.

Thus *De Jager v. A.-G. of Natal* (p. 292 below) decided that local allegiance does not cease even though the King's protection be temporarily withdrawn when British territory is occupied by enemy forces in time of war.

R. v. Lynch (p. 290 below) is an authority for the rule that a British subject commits treason if he becomes naturalized in an enemy state, and, further, that his act does not operate to divest him of his status of British subject.

While dealing with the subject of Allegiance, it may be well to give the terms of the Oath of Allegiance, which is exacted of naturalized British subjects and Members of Parliament and other officers. The regular form is

'I, *A. B.*, swear by Almighty God that I will be faithful and bear true allegiance to His Majesty, King George the Fifth, his Heirs and Successors, according to law. So help me God.'

The oath to be taken by Members of the Parliament of the Irish Free State is in the following form:

'I, *C. D.*, do solemnly swear true faith and allegiance to the Constitution of the Irish Free State as by law established and that I will be faithful to His Majesty, King George the Fifth, his Heirs and Successors by law, in virtue of the common citizenship of Ireland with Great Britain and her adherence to and membership of the group of nations forming the British Commonwealth of Nations.'

CASES

R. v. LYNCH, [1903] 1 K. B. 444

KING'S BENCH DIVISION

Trial at bar for high treason.

[The prisoner, an Irishman born in Australia, and thereby a British subject, had on January 18, 1900, while His Majesty was at war with the South African Republic, volunteered for service in the army of the Republic, and, on the same day, after taking an oath of allegiance, had been granted letters of naturalization as a burgher of the Republic. He had subsequently fought on behalf of the South African Republic and the Orange Free State against His Majesty's forces. It was in respect of all these overt acts, the volunteering for service against His Majesty, the taking of the oath of allegiance, and the subsequent acts of warfare, that he was charged.]

LORD ALVERSTONE C.J.—We have none of us any doubt whatever upon this point; but, having regard to the nature of the proceedings and their serious character, we thought it better that the matter should be fully argued before we expressed our opinion. The indictment charges the prisoner in two counts with adhering to the Government of the South African Republic, and in the others with adhering to the Government of the Orange Free State, and it alleges altogether some fifteen overt acts; but for the purposes of the argument that has been addressed to us it is important to draw a distinction between the two first overt acts and the subsequent overt acts. The two first acts, the declaration of willingness to take up arms and the taking of oath of allegiance to the South African Republic, although they took place on the same day as the grant of letters of naturalization, in fact preceded it. The other overt acts were all deliberate acts of warfare or in aid of warfare against the forces of the Crown, and took place subsequently to the grant of naturalization. It is not disputed on behalf of the prisoner that, apart from the Naturalization Act, 1870, the alleged naturalization in the enemy State would afford no defence. But reliance is placed on s. 6, which provides that 'any British subject who has at any time before or may at any time after the

passing of this Act, when in any foreign State and not under any disability, voluntarily become naturalized in such State, shall from and after the time of his so having become naturalized in such foreign State, be deemed to have ceased to be a British subject, and be regarded as an alien.' It is contended that this provision entitles a British subject to become an alien and throw off his allegiance to the Crown even in time of war. Even if that were so, it would afford no defence in respect to the two first overt acts, for by s. 15, 'Where any British subject has in pursuance of this Act become an alien, he shall not thereby be discharged from any liability in respect of any acts done before the date of his so becoming an alien.' And it cannot be seriously contended that the two first acts which formed the basis of the naturalization, and without which naturalization could not under the circumstances have been obtained at all, were not 'done before the date of his so becoming an alien' within the meaning of s. 15. But, further, I am clearly of opinion that s. 6 does not empower a British subject to become naturalized in an enemy country during time of war, and that consequently the question of the prisoner's liability with respect to the subsequent overt acts must also be left to the jury. In my opinion there is nothing in the Act of 1870 to justify the contention that an act of treason can give any rights to any person whatever. If it was the intention of the Legislature to produce so strange a result, that intention must be found expressed in clear and explicit language, and not be inferred from general language designed to serve another and useful purpose. Whatever a declaration of war may or may not do, it at any rate prevents British subjects from making arrangements with the King's enemies, when such arrangements would constitute crimes against the law of the country to which they owe allegiance.

CHANNELL J.—I am of the same opinion. The only question before us is the construction of s. 6 of the Naturalization Act, 1870, and it seems to me that there is not a word in the section that can possibly bear the construction that is sought to be put upon it. The section is not dealing with the circumstances under which naturalization may be legal or may be illegal, but with the consequences of the naturalization. It assumes throughout that naturalization did exist, and was not in itself unlawful, and then it says that where naturalization in a foreign State has taken place or may take place it shall have certain consequences. It does not

make naturalization under the particular circumstances more legal or more illegal than it was before. And it is not disputed that before the Act naturalization in a foreign State with which we were at peace was legal, but in an enemy State was obviously illegal and an act of treason. The result is that, so far as the first two overt acts are concerned, they would have been acts of treason if committed before 1870, and there is nothing in the Act to make them otherwise now. That being so, it is unnecessary to have recourse to s. 15. Indeed, I think there is much to be said in favour of the contention that the declaration and oath which were expressly made for the purpose of obtaining naturalization, and were followed by letters of naturalization granted on the same day, might fairly be treated as one transaction. Therefore, in my opinion, s. 15 does not help the case much. But, as I have said, it is not necessary to have recourse to it. The subsequent overt acts no doubt stand on a different footing, and I am quite prepared to adopt everything that has been said by my Lord on that branch of the case.

WILLS J. delivered a concurring judgment.

Judgment for the Crown.

✓ DE JAGER v. A.-G. OF NATAL, [1907] A. C. 326

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

[The petitioner was at the time of the outbreak of the South African War in 1899 and after a burgher of the South African Republic resident at Waschbank, in the Colony of Natal. When the forces of the South African Republic invaded the Colony and the British forces evacuated Waschbank, the petitioner joined the invaders and fought in the ensuing campaigns. Later he was tried, found guilty of high treason, and sentenced to five years' imprisonment and a fine of £5000. After a considerable delay, he presented a petition for leave to appeal to the Privy Council.]

The judgment of the Judicial Committee was delivered by

LORD LOREBURN L.C.—The petitioner Lodewyk Johannes De Jager was adjudged guilty of high treason by the special Court constituted by Act No. XIV of 1900 of the Colony of Natal, and now seeks special leave to appeal to His Majesty in Council from that judgment and the sentence which followed. The circumstances

and the questions of law raised are fully set out in the petition and need not be repeated here. Their Lordships have not to consider any facts or features of this case except the points of law upon which Sir Robert Finlay insisted.

It is old law that an alien resident within British territory owes allegiance to the Crown, and may be indicted for high treason, though not a subject. Some authorities affirm that this duty and liability arise from the fact that while in British territory he receives the King's protection. Hence Sir R. Finlay argued that when the protection ceased its counterpart ceased also, and that as the British forces evacuated Waschbank on October 21, 1899, the petitioner was lawfully entitled to assist the invaders on and after October 24 without incurring the penalty of high treason.

Their Lordships are of opinion that there is no ground for this contention. The protection of a state does not cease merely because the State forces, for strategical or other reasons, are temporarily withdrawn, so that the enemy for the time exercises the rights of an army in occupation. On the contrary, when such territory reverts to the control of its rightful Sovereign, wrongs done during the foreign occupation are cognizable by the ordinary Courts. The protection of the Sovereign has not ceased. It is continuous, though the actual redress of what has been done amiss may be necessarily postponed until the enemy forces have been expelled. Their Lordships consider that the duty of a resident alien is so to act that the Crown shall not be harmed by reason of its having admitted him as a resident. He is not to take advantage of the hospitality extended to him against the Sovereign who extended it. In modern times great numbers of aliens reside in this and in most other countries, and in modern usage it is regarded as a hardship if they are compelled to quit, as they rarely are, even in the event of war between their own Sovereign and the country where they so reside. It would be intolerable, and must inevitably end in a restriction of the international facilities now universally granted, if, as soon as an enemy made good his military occupation of a particular district, those who had till then lived there peacefully as aliens could with impunity take up arms for the invaders. A small invading force might thus be swollen into a considerable army, while the risks of transport (which in the case of oversea expeditions are the main risks of invasion) would be entirely evaded by those who, instead of embarking from their

own country, awaited the expedition under the protection of the country against which it was directed. These considerations would not justify a British Court in deciding any case contrary to the law, but they offer an illustration of consequences which would follow if the law were as the petitioner maintains. There is no authority which compels their Lordships to arrive at so strange a conclusion. The questions raised are, no doubt, of general importance, but their Lordships, after hearing the arguments of counsel in support of the petition, do not consider the case to be attended with doubt, and they will therefore humbly advise His Majesty to dismiss this petition

There will be no order as to costs.

THE CROWN AND FOREIGN AFFAIRS

A. Acts of State.

At municipal law and in the eyes of municipal Courts the Crown is absolute in relation to foreign affairs. Therefore it may act towards foreign states and their subjects outside the realm in a perfectly arbitrary fashion; towards them the Crown has no duties, but only powers. Doubt has been expressed whether such powers are included in the term Prerogative. Warrington L.J., in *In re Ferdinand, Ex-Tsar of Bulgaria*, [1921] 1 Ch. at p. 189, observes,

'Prerogative properly describes the power and authority of the King in relation to his own subjects, and not rights vested in him in relation to persons owing no allegiance to him.'

The acts of the Crown in foreign affairs are described as acts of State, and the term is used of them exclusively. The distinction is not altogether easy to defend, for there seems little doubt that all acts done by the discretionary authority of the Crown, other than those authorized by statute, are of the same legal nature, whether they are performed within or outside the realm. But it is nevertheless convenient. Whereas in respect of acts done within the realm, the Courts are not obliged to abandon jurisdiction at the mention of Prerogative (see p. 58 above), they cannot inquire into the validity of an act of State. Doubtless the Crown is bound to act in accordance with the dictates of international law, but the obligation can be enforced only by diplomatic means. This point is brought out clearly in the case of the *Secretary of State for India v. Kamachee Boye Sahaba* (p. 304 below).

This immunity would be illusory if it were not shared by agents of the Crown. Therefore a plea of act of State may be successfully raised wherever an action in tort is brought by a foreigner without the allegiance against a person who has acted under a prior authorization from the Crown, or whose act is subsequently ratified. This is the true point of the rather unsatisfactory case of *Buron v. Denman*, (1848) 2 Ex. 167. The material facts there were as follows:

The defendant, a naval commander stationed on the coast of

Africa with instructions to suppress the slave trade, was requested by the Governor of Sierra Leone to obtain the release of two British subjects detained as slaves at the Gallinas. This he did, and then, without orders, fired a barracoen belonging to the plaintiff, who was a Spaniard, carrying on the slave trade at that place. These proceedings having been communicated to the Home Government, the Crown ratified and adopted the act of the defendant. It was evident that the plaintiff's action of trespass must succeed unless the act could be justified as an act of State. It was not seriously contested for the plaintiff that if the defendant had acted under specific orders from the Crown he would be protected, but there was in fact no prior authorization. The main question therefore was whether the subsequent ratification by the Crown was equivalent to a prior authorization, and the Court, after some hesitation on the part of Parke B., held that it was. Verdict for the defendant.

At first sight this decision seems at variance with the rule that the orders of the Crown are no defence to an action in tort. But that rule proceeds from the doctrine that, as the King can do no wrong, neither can he authorize wrong. Here it could not be alleged that the Crown authorized a wrong, for the act authorized was within the powers of the Crown. The same immunity is for the same reason accorded to a British subject acting under the orders of a foreign sovereign (see *Dobree v. Napier*, (1836) 2 Bing. (N.C.) 781, *Reg. v. Lesley*, (1860) Bell C. C. 220, and *Carr v. Francis, Times & Co.*, [1902] A. C. 176). Note that there can be no act of State between the Crown and persons within the allegiance (*Walker v. Baird*, *Johnstone v. Pedlar*, pp. 810, 812 below). *Cook v. Sprigg*, [1899] A. C. 572, seems to create a difficulty: there the government of Cape Colony refused after annexing Pondoland to recognize concessions made to the plaintiffs (who were British subjects) by Sigcau, the former paramount chief of the annexed territory. It was held by the Privy Council that the action failed on a technical ground, but they also said that the refusal to recognize the concessions could be justified on the ground that the annexation was an act of State. It will be observed that there is no suggestion of an act of State towards the plaintiffs. The act of State was between the Crown and Sigcau; the plaintiffs were indirectly the victims of it. When the Crown takes possession of territory by an act of State, the territory becomes a conquered

or ceded colony, and in such a colony the Crown has absolute power. Cook and his co-plaintiffs were no worse off than any other British subjects who happen to live in a conquered or ceded colony.

Hitherto attention has mainly been paid to the immunity which attaches to acts of State; but Fletcher Moulton L.J., in what is perhaps the best judicial treatment of the topic, *Salaman v. Secretary of State for India*, [1906] 1 K. B. at p. 639, does not so much as mention *Buron v. Denman*.

'An act of State,' he says, 'is essentially an exercise of sovereign power, and hence cannot be challenged, controlled, or interfered with by municipal Courts. Its sanction is not that of law, but that of sovereign power, and, whatever it be, municipal Courts must accept it, as it is, without question. But it may, and often must, be part of their duty to take cognizance of it. For instance, if an act is relied upon as being an act of State, and as thus affording an answer to claims made by a subject, the Courts must decide whether it was in truth an act of State, and what was its nature and extent. An example of this is to be found in the case of *Forester v. Secretary of State for India in Council*, (1872) L. R. Ind. Ap. Supp. Vol. 10. But in such an inquiry the Court must confine itself to ascertaining what the act of State in fact was, and not what in its opinion it ought to have been. In like manner municipal Courts may have to consider the results of acts of State, i.e., their effects on the rights of individuals, and even of the Government itself. Acts of State are not all of one kind; their nature and consequences may differ in an infinite variety of ways, and these differences may profoundly affect the position of municipal Courts with regard to them. For instance, an act of State may fix the relations between two States, each of which continues to possess an independent existence. The consequences of such an act of State are entirely beyond the cognizance of municipal Courts, because they do not administer treaty obligations between independent States. An example of such an act of State may be found in the case of *Nabob of Carnatic v. East India Co.*, (1793) 2 Ves. 56. But the object and effect of an act of State are not necessarily of this kind. Its intention and effect may be to modify and create rights as between the Government and individuals, who are, or who are about to become, subjects of the Government. In such cases the rights accruing therefrom may have to be adjudicated upon by municipal Courts. Let me take a simple example. Let us suppose that a Government by an act of State annexes a neighbouring country, and formally takes over all the property and liabilities of the former ruler, and that a part of

such property consists of debts due to him. The Government is not compelled to collect such debts *vi et armis*; it may avail itself of the assistance of its Courts of law for the purpose, in the same way as though the debts had accrued due to it otherwise than by an act of State. But in deciding on such a claim the Courts must loyally accept the act of State as effective. Evidence that the debt was due to the former ruler would thereby become evidence of its being due to the existing Government; and I see no reason why in such a case a claim of a converse character might not equally be entertained by municipal Courts, and a subject recover from the existing Government by the processes of law applicable to such a case any debts due from the former ruler. The judgments in the case of *Frith v. Reg.*, (1872) L. R. 7 Ex. 365, seem to me to give support to this view.

'The true view of an act of State appears to me to be that it is a catastrophic change, constituting a new departure. Municipal law has nothing to do with the act of change by which this new departure is effected. Its duty is simply to accept the new departure; and its power and its duty to adjudicate upon, and enforce rights of individuals, or of the Government, in the future, appear to me to be precisely the same whether the origin of such rights be an act of State or not.'

It will be seen that he considers the making of a treaty an act of State, just as much as an act of violence (*Buron v. Denman*) or the annexation of a province (*Secretary of State for India v. Kamachee Boye Sahaba*). In truth all that the Crown does in the sphere of foreign affairs falls within the category of acts of State.

B. Treaties.

The subject of Treaties raises interesting questions.

1. There is no doubt that the Crown has full power to negotiate and conclude treaties with foreign states, and that, the making of a treaty being an act of State, treaty obligations cannot be enforced in a municipal court. A curious attempt was made by a subject to enforce what he alleged to be a trust which the Crown had undertaken on his behalf by treaty. In this case (*Rustomjee v. Reg.*, (1876) 2 Q. B. D. at p. 73), Lord Coleridge C.J. explained the law on the subject.

'The making of peace and the making of war, as they are the undoubted, so they are, perhaps, the highest, acts of the prerogative of the Crown. The terms on which peace is made are in the absolute discretion of the Sovereign. . . . The Queen might or not, as she thought fit, have made peace at all; she might or not, as she thought

fit, have insisted on this money being paid her. She acted throughout the making of the treaty and in relation to each and every of its stipulations in her sovereign character, and by her own inherent authority; and, as in making the treaty, so in performing the treaty, she is beyond the control of municipal law, and her acts are not to be examined in her own Courts. It is a treaty between herself as sovereign, and the Emperor of China as sovereign, and though he might complain of the infraction, if infraction there were, of its provisions, her subjects cannot. We do not say that under no circumstances can the Crown be a trustee; we do not even say that under no circumstances can the Crown be an agent; but it seems clear to us that in all that relates to the making and performance of a treaty with another sovereign the Crown is not, and cannot be, either a trustee or an agent for any subject whatever.

'We do not, indeed, doubt that, on the payment of the money by the Emperor of China, there was a duty on the part of the English Sovereign to administer the money so received according to the stipulations of the treaty. But it was a duty to do justice to her subjects according to the advice of her responsible ministers; not the duty of an agent to a principal, or of a trustee to a cestui que trust. If there has been a failure to perform that duty, which we only suggest for the sake of argument, it is one which Parliament can and will correct: not one with which the Courts of Law can deal.'¹

2. But a treaty, like a contract, is made to be performed. Can the Crown bind the nation to perform any and every treaty which it makes? In general it seems that the Crown makes treaties as the authorized representative of the nation. There are, however, two limits to its capacity: it cannot legislate and it cannot tax without the concurrence of Parliament. The effect of the former limitation was shown in *The Parlement Belge*, (1879) 4 P. D. 429, where a public vessel belonging to the King of the Belgians became involved in a collision and proceedings were taken against her in the Court of Admiralty. Sir R. Phillimore, after holding that no immunity from arrest attached at international law to public vessels other than warships, decided that such an immunity could not be effectually granted by a treaty concluded by the Crown without the assent of Parliament, for the change of law involved in depriving the subject of his remedy was beyond the capacity of the Crown acting alone. This decision was reversed in the Court of Appeal on the

¹ This view has once more been strongly re-affirmed in *Civilian War Claimants' Association v. R.*, [1932] A.C. 14.

ground that all public vessels are immune from arrest at international law; it therefore became unnecessary to say anything about the second portion of Sir R. Phillimore's decision and it remains good law.¹

If then the Crown acting alone should by treaty promise to make some alteration in the law, the treaty would theoretically be binding; if however some party to an action were to rely upon it as having effected a change in the law, he would be disappointed, for the Courts would take no account of it in the absence of an Act of Parliament. The Crown would have made a promise which it was unable to carry out, and the practical conclusion is that the Crown may not without the aid of Parliament make a treaty which involves an alteration in the law. In all such treaties it is customary to insert a clause making the validity of the treaty dependent on its ratification by Parliament. The same reasoning applies to treaties which purport to tax the subject. As a matter of fact most modern treaties are of this kind; and of course every exercise of the treaty-making power of the Crown is subject to the political control of the House of Commons in the same way, though not perhaps in practice to the same degree, as any other exercise of the Prerogative.

In *Walker v. Baird* (p. 310 below) the Crown tried to establish its right, as incident to the treaty-making power, of compelling its subjects to observe the provisions of a treaty having for its object the preservation of peace. The Privy Council held that the question was not properly raised, and refused to decide it. Note that the Crown's contention was closely analogous to that which was allowed in *Bates's Case* (p. 36 above); in that case the control of foreign policy was held to include the power of regulating foreign trade and hence of imposing additional customs duties. But since the Long Parliament it has been evident that there can

¹ It is interesting to note that this view is found as early as 1728 in an opinion of Yorke A.-G. and Talbot S.-G. concerning the true interpretation of a treaty of neutrality concluded in 1686 between the Crowns of England and France. The treaty gave the two sovereigns power to seize ships belonging to each other's subjects found contravening certain articles agreed between them. The law officers gave it as their opinion that each sovereign was at liberty to seize ships belonging to subjects of the other, but not ships belonging to his own subjects, for they said, 'If such intention had appeared, we are humbly of opinion, that it would not have had its effect with respect to his majesty's subjects, unless the said articles had been confirmed, either by Parliament of Great Britain, or by acts of assembly, within the respective plantations'.—*Chalmers's Cases on Constitutional Law*, ii. 339.

be no encroachment on the exclusive right of Parliament either to legislate or to tax.

8. The Crown may acquire territory by treaty or otherwise. Can it cede territory without the consent of Parliament? There is singularly little authority on either side. Those who deny the extreme claims of the Crown have to admit that it may cede territory as part of the terms of a treaty of peace, but there is no clear authority for stopping at that point. The question was raised before the Privy Council in the case of *Damodhar Gordhan v. Deoram Kanji*, (1876) 1 App. Cas. 382. There the defendant had objected that the Court of first instance acted without jurisdiction, in that the land in dispute had been ceded by the Crown to an Indian Prince and thereby withdrawn from the jurisdiction of the Court. The High Court of Bombay overruled the objection on the ground that 'it was beyond the power of the British Crown, without the concurrence of the Imperial Parliament, to make any cession of territory within the jurisdiction of any of the British Courts in India, in time of peace, to a foreign power'. The attempted cession was therefore inoperative and the jurisdiction remained. On appeal to the Privy Council, Lord Selborne said (at p. 373):

'The question, whether the law thus laid down by the High Court of *Bombay* is correct, was fully and ably argued at this Bar in July last; and their Lordships would have been prepared to express the opinion, which they might have formed upon it, if, in the result of the case, it had become necessary to do so. But having arrived at the conclusion that the present appeal ought to fail without reference to that question, they think it sufficient to state that they entertain such grave doubts (to say no more) of the soundness of the general and abstract doctrine laid down by the High Court of *Bombay*, as to be unable to advise Her Majesty to rest her decision on that ground.'

The Privy Council held (at p. 381) that

'What was attempted was, in their Lordships' judgment, neither more nor less than a rearrangement of jurisdictions within British territory, by the exclusion of a certain district from the regulations and codes in force in the *Bombay* Presidency, and from the jurisdiction of all the High Courts, with a view to the establishment therein of a native jurisdiction under British supervision and control. But this could not be done without a legislative Act, which, in this case, was never passed.'

In other words, the Crown may, it seems, cede territory by its Prerogative, but cannot without an Act of the Legislature, take the much smaller and less important step of rearranging jurisdictions.

This view of the law received the powerful support of Mr. Gladstone and Sir William Harcourt in the debate on the cession of Heligoland to the German Empire in 1890, and it has since been adopted in several Indian cases. But there, perhaps, as Anson says (*The Crown*, Part II, p. 106), special conditions apply.

The question may perhaps be asked whether the cession of territory and the consequent handing over British subjects to a foreign state is not a much more serious disturbance of their rights than any Act of legislation or tax. But the prohibition of unparliamentary legislation and taxation rests upon rules of positive law, and does not restrict such prerogative rights as do not directly conflict with it.

The position is admirably summed up in the following extract from a paper by Alexander Hamilton in the *Federalist*:

'The King of Great Britain can, of his own accord, make Treaties of peace, commerce, and alliance. It has been asserted that his authority in this respect is not conclusive, and that conventions with Foreign Powers are subject to revision and stand in need of ratification in Parliament, but I believe that this doctrine was never heard of until it was broached on this occasion. Every jurist of that Kingdom and man acquainted with its Constitution knows it is an established fact that the prerogative of making Treaties exists in the Crown in its utmost plenitude. Parliament, it is true, is sometimes seen employing itself in altering existing laws in conformity with the stipulations of new Treaties, and this may possibly have given birth to the imaginations that its co-operation was necessary to the obligatory efficacy of a Treaty.'—(Quoted by Sir W. Harcourt in the Heligoland Debate, Hansard, vol. cccxlvii, col. 776.)

C. *The Recognition of Foreign Sovereigns.*

In the words of Lord Sumner in *Duff Development Co. v. Kelantan Government*, [1924] A. C. at p. 824,

'It is the prerogative of the Crown to recognize or to withhold recognition from States or chiefs of States, and to determine from time to time the status with which foreign powers are to be deemed to be invested. This being so, a foreign ruler, whom the Crown

recognizes as a sovereign, is such a sovereign for the purposes of an English Court of law, and the best evidence of such recognition is the statement duly made with regard to it in His Majesty's name. Accordingly where such a statement is forthcoming no other evidence is admissible or needed.'

This, in practice, gives the Crown a very wide power of conferring immunity on foreign states and their diplomatic representatives and so of depriving a subject of his right of action, but this is not objectionable as being an act of State done to the subject; the act of State is between the Crown and the foreigner, and its effect on the subject is merely indirect.

Duff Development Co. v. Kelantan Government (p. 816 below) shows that a foreign sovereign, duly recognized as such, is exempt from the jurisdiction of our courts, unless he unequivocally submits to it. On diplomatic immunities, &c., reference should be made to works on international law, to which subject these topics properly belong. The cases of *Fenton Textile Association v. Krassin*, (1921) 38 T. L. R. 259, *Aksionairnoye Obschestvo A. M. Luther v. James Sagor & Co.*, [1921] 3 K. B. 582, and *Engelke v. Musmann*, [1928] A. C. 433, should be particularly noticed.

CASES

SECRETARY OF STATE FOR INDIA *v.* KAMACHEE BOYE SAHABA,
(1859) 13 Moo. P. C. 22

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

LORD KINGSDOWN.—This is an appeal from a decree of the equity side of the Supreme Court of Judicature at Madras, by which it was declared that the Respondent, the Plaintiff in the suit below, as the eldest widow of Sevajee, late Rajah of Tanjore, who had died intestate, was entitled to inherit and possess, as his heir and legal representative, his private and particular estate and effects, real and personal, left by him at the time of his death, subject to the payment and satisfaction thereof of the present debts, if any, of Sevajee, and to any legal claims and demands that might exist against such private and particular estate and effects; and the Court declared that the Defendants, the East India Company, were trustees for the Plaintiff and in respect of the private and particular estate and effects, real and personal, left by Sevajee at the time of his death, and possessed by them, their officers, servants, and agents, as in the Bill mentioned. The decree also proceeded to direct various accounts and inquiries founded upon these declarations.

In the very able argument addressed to us at the Bar, many objections were made by the Appellant's Counsel to this decree; but the main point taken, and that on which their Lordships think that the case must be decided, was this, that the East India Company, as trustees for the Crown, and under certain restrictions, are empowered to act as a Sovereign State in transactions with other Sovereign States in India; that the Rajah of Tanjore was an independent Sovereign in India; that on his death, in the year 1855, the East India Company, in the exercise of their Sovereign power, thought fit, from motives of State, to seize the Raj of Tanjore and the whole of the property the subject of this suit, and did seize it accordingly; and that over an act so done, whether rightfully or wrongfully, no Municipal Court has any jurisdiction.

The general principle of law was not, as indeed it could not, with any colour of reason be disputed. The transactions of inde-

pendent States between each other are governed by other laws than those which Municipal Courts administer: such Courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make.

But it was contended on the part of the Respondent, that this case did not fall within the principle, for the following reasons:—

First. Because, as it was said, the East India Company did not stand in the position of an independent Sovereign; that such powers of Sovereignty as were exercised on behalf of the Company were vested, not in the Company, but in the Governor-General and Council, who are protected by legislative enactments for what they may do in that character. Secondly, that the seizure in this case did not take place by the exercise of a Sovereign power against another independent power; but was a mere succession, by an asserted legal title, to property alleged to have lapsed to the Company. And, thirdly, that there is a distinction between the public and private property of the Rajah, and that the Company never intended to exercise their Sovereign powers as to the latter, whatever they might do with respect to the former; that the Company, therefore, are in possession of property by the unauthorized act of their officers, for which no protection can be claimed on the grounds which would protect the public property from the jurisdiction of the Court.

On the first point their Lordships are unable to discover any room for doubt. The careful and able review of the several Charters and Acts of Parliament bearing upon the subject which they had the advantage of hearing at the Bar, has satisfied them that the law, as it stood in the year 1839, is accurately stated in the following passage in the judgment of Chief Justice Tindal in case of *Gibson v. The East India Company*, (1839) 5 Bing. N.C. 273, in which, after referring to various legislative enactments, he observes that from these—‘It is manifest that the East India Company have been invested with powers and privileges of a two-fold nature, perfectly distinct from each other; namely, powers to carry on trade as merchants, and (subject only to the prerogative of the Crown, to be exercised by the Board of Commissioners for the affairs of India) power to acquire and retain and govern territory, to raise and maintain armed forces by sea and land, and to make peace or war with the Native powers of India.’

That acts done in the execution of these Sovereign powers were

not subject to the control of the Municipal Courts, either of India or Great Britain, was sufficiently established by the cases of *The Nabob of Arcot v. The East India Company*, in the Court of Chancery, in the year 1793 (4 Bro. C. C. 180), and *The East India Company v. Syed Ally* (see 7 Moo. Ind. App. 555), before the Privy Council in 1827.

The subsequent Statute, 3rd and 4th Will. IV., c. 85, in no degree diminishes the authority of the East India Company to exercise, on behalf of the Crown of Great Britain, and subject to the control thereby provided, these delegated powers of Sovereignty.

The next question is, what is the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain, of the dominions and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal law? or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of the late Rajah of Tanjore, in trust for those who, by law, might be entitled to it on the death of the last possessor? If it were the latter, the defence set up, of course, has no foundation.

It is extremely difficult to discover in these papers any ground of legal right, on the part of the East India Company, or of the Crown of Great Britain, to the possession of this Raj, or of any part of the property of the Rajah on his death; and, indeed, the seizure was denounced by the Attorney-General (who, from circumstances explained to us at the hearing, appeared as Counsel for the Respondent, and not in his official character for the Appellant) as a most violent and unjustifiable measure. The Rajah was an independent Sovereign of territories undoubtedly small, and bound by Treaties to a powerful neighbour, which left him, practically, little power of free action; but he did not hold his territory, such as it was, as a fief of the British Crown, or of the East India Company; nor does there appear to have been any pretence for claiming it, on the death of the Rajah without a son, by any legal title either as an escheat, or as *bona vacantia*. It should seem, therefore, that the possession could hardly have been taken upon any such grounds.

Accordingly, the Defendants in their answer, allege that on the death of the late Rajah, 'it was determined, as an act of State, by the Defendants and the British Government,' that the Raj and

dignity of Rajah of Tanjore was extinct, and that the State of Tanjore had thereupon lapsed to the Defendants in trust for Her Majesty; and it was thereupon also determined by the Defendants, as an act of State and Government, that the whole dominions and Sovereignty of the State of Tanjore, together with the property belonging thereto, should be assumed by the Defendants in trust for Her Majesty the Queen, and should become part of the British territories and dominions in India, in trust for Her Majesty. They then allege that the whole of the property which they have seized has been seized by virtue of their Sovereign rights on behalf of Her Majesty, and insist that the Court has no jurisdiction to inquire into the circumstances of the seizure, or its justice with respect to the whole or any part of the seizure.

[His Lordship then sketched the steps taken in connexion with the seizure of Tanjore and continued:]

It is by these acts of Mr. Forbes that the East India Company is in possession of whatever property it holds now claimed by the Respondent. The acts of Mr. Forbes were approved by the Governor of Madras by a minute, dated the 21st of October, 1856; and they are adopted and ratified by the East India Company in their answer in this suit.

What property of the Rajah was within the authority given to Mr. Forbes, and what may be the consequence of any seizure in excess of that authority, we will consider under the next head; but that the seizure was an exercise of Sovereign power effected at the arbitrary discretion of the Company, by the aid of military force, can hardly admit of doubt.

But then, it is contended, that there is a distinction between the public and private property of a Hindoo Sovereign, and that although during his life, if he be an absolute Monarch, he may dispose of all alike, yet on his death some portions of his property, termed his private property, will go to one set of heirs, and the Raj with that portion of the property which is called public, will go to the succeeding Rajah.

It is very probable that this may be so; the general rule of Hindoo inheritance is partibility, the succession of one heir, as in the case of a Raj, is the exception. But assuming this, if the Company, in the exercise of their Sovereign power, have thought fit to seize the whole property of the late Rajah, private as well as public, does that circumstance give any jurisdiction over their

acts to the Court at Madras? If the Court cannot inquire into the act at all because it is an act of State, how can it inquire into any part of it, or afford relief on the ground that the Sovereign power has been exercised to an extent which Municipal law will not sanction?

It is said, however, that it was not the intention of the East India Company that the private property of the Rajah should be the subject of seizure, and it is observed in the judgment of the Court below, that the letter of Mr. Forbes to the Sirkele of the 17th of October, 1856, shows that he knew there was private property amongst that about to be seized; and that he expressly states that all property to which a claim can be established shall be restored to its owner.

But, it appears to their Lordships, that in this passage, the Chief Justice has not quite accurately collected the meaning of Mr. Forbes's letter; the distinction there made between private and public property seems to apply, not to property of the Rajah, but to property which might be seized by the officers as in the possession of, or apparently belonging to, the Rajah, while in fact it belonged to, or was subject to, the claims of other persons. All claims which might be advanced to any part of the property seized, by institutions or individuals, were to be carefully investigated, and all to which a claim might be substantiated would be restored to the owner.

But, whatever may be the meaning of this letter, it affords no argument in favour of the judgment of the Court; but rather an argument against it. It shows that the Government intended to seize all the property, which actually was seized, whether public or private, subject to an assurance that all which, upon investigation, should be found to have been improperly seized, would be restored. But, even with respect to property not belonging to the Rajah, it is difficult to suppose that the Government intended to give a legal right of redress to those who might think themselves wronged, and to submit the conduct of their officers, in the execution of a political measure, to the judgment of a legal tribunal. They intended only to declare the course which a sense of justice and humanity would induce them to adopt.

With respect to the property of the Rajah, whether public or private, it is clear that the Government intended to seize the whole, for the purposes which they had in view required the

application of the whole. They declared their intention to make provision for the payment of his debts, for the proper maintenance of his widows, his daughters; his relations and dependants; but they intended to do this according to their own notions of what was just and reasonable, and not according to any rules of law to be enforced against them by their own Courts. In the letter already referred to of the 8th of September, 1856, from the Secretary of the Government in India to the Government of Madras, it is distinctly stated:—‘The relations whom the Rajah of Tanjore has left are in this position: they are without any rights of inheritance;’ and it then proceeds to enumerate those relations who are thus without any rights of inheritance, and mentions as the first amongst them the Queen Dowager, the Respondent in this appeal; and it proceeds to speak of all those relations as claimants upon the consideration of the Government, and to describe in what manner those claims are to be met. How is it possible, in the face of this declaration, to hold that it was the intention of the Government to recognize the right of inheritance of the Respondent, and to exclude from seizure, and to subject to process of law, any portion of the property of the deceased Sovereign? If there had been any doubt upon the original intention of the Government, it has clearly ratified and adopted the acts of its agent, which according to the principle of the decision in *Buron v. Denman*, is equivalent to a previous authority.

The result, in their Lordships’ opinion, is, that the property now claimed by the Respondent has been seized by the British Government, acting as a Sovereign power, through its delegate the East India Company; and that the act so done, with its consequences, is an act of State over which the Supreme Court of Madras has no jurisdiction.

Of the propriety or justice of that act, neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to say that, even if a wrong has been done, it is a wrong for which no Municipal Court of justice can afford a remedy.

They must advise Her Majesty to reverse the decree complained of, and to dismiss the Plaintiff’s Bill; but they will recommend

that no costs should be given of the proceedings either in the Court below or in this appeal.

WALKER v. BAIRD, [1892] A. C. 491

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

The judgment of their Lordships was delivered by

LORD HERSCHELL:—

This is an appeal from an order of the Supreme Court of Newfoundland. The respondents by their statement of claim alleged that the appellant wrongfully entered their messuage and premises, and took possession of their lobster factory and of the gear and implements therein, and kept possession of the same for a long time, and prevented the respondents from carrying on the business of catching and preserving lobsters at their factory.

By the statement of defence the appellant said that he was captain of H.M.S. *Emerald*, and the senior officer of the ships of Her Majesty the Queen employed during the current season on the Newfoundland fisheries; that to him, as such senior officer and captain, was committed by the Lords Commissioners of the Admiralty, by command of Her Majesty, the care and charge of putting in force and giving effect to an agreement embodied in a *modus vivendi* for the lobster fishing in Newfoundland during the said season, which as an act and matter of State and public policy had been by Her Majesty entered into with the Government of the Republic of France; that the said agreement provided, amongst other things, that on the coasts of Newfoundland where the French enjoy rights of fishing conferred by the treaties, no lobster factories which were not in operation on the 1st of July, 1889, should be permitted, unless by the joint consent of the commanders of the British and French naval stations; that the said lobster factory of the plaintiffs being situate on the said part of the coasts of Newfoundland, and being one that was not in operation on the said 1st of July, 1889, and one which was without the consent aforesaid being used and worked by the plaintiffs as a lobster factory whilst the said agreement was in force, and such use and working thereof being prohibited by the said agreement and in contravention of its terms, the defendant in performance of his duties did for the cause assigned enter into and take possession of the messuage and premises in the statement of claim

mentioned, and of certain gear and implements; that such entry into and taking possession of the said messuage and premises, gear, and implements, were made and done by the defendant in his public political capacity, and in exercise of the powers and authorities, and in performance of the duties committed to him, and were acts and matters of State done and performed under the provisions of the said *modus vivendi*; that the action taken by the defendant in putting in force the provisions of the said *modus vivendi* had with full knowledge of all the circumstances and events been approved and confirmed by Her Majesty as such act and matter of State and public policy, and as being in accordance with the instructions of Her Majesty's Government. The defendant submitted that the matters set forth in his answer to the statement of claim, and on which he rested his right to enter and take possession of the premises, were acts and matters of State arising out of the political relations between Her Majesty the Queen and the Government of the Republic of France, that they involved the construction of treaties and of the said *modus vivendi* and other acts of State, and were matters which could not be inquired into by the Court.

The plaintiffs objected that the defence did not set forth any answer or ground of defence to the action, and it was ordered by the Court that the points of law should be first disposed of. The Supreme Court of Newfoundland, after hearing argument, held that the statement of defence disclosed no answer to the plaintiffs' claim, but gave the defendant leave to amend.

In their Lordships' opinion this judgment was clearly right, unless the defendant's acts can be justified on the ground that they were done by the authority of the Crown for the purpose of enforcing obedience to a treaty or agreement entered into between Her Majesty and a foreign power. The suggestion that they can be justified as acts of State, or that the Court was not competent to inquire into a matter involving the construction of treaties and other acts of State, is wholly untenable.

The learned Attorney-General, who argued the case before their Lordships on behalf of the appellant, conceded that he could not maintain the proposition that the Crown could sanction an invasion by its officers of the rights of private individuals whenever it was necessary in order to compel obedience to the provisions of a treaty. The proposition he contended for was a more limited

one. The power of making treaties of peace is, as he truly said, vested by our constitution in the Crown. He urged that there must of necessity also reside in the Crown the power of compelling its subjects to obey the provisions of a treaty arrived at for the purpose of putting an end to a state of war. He further contended that if this be so, the power must equally extend to the provisions of a treaty having for its object the preservation of peace, that an agreement which was arrived at to avert a war which was imminent was akin to a treaty of peace, and subject to the same constitutional law. Whether the power contended for does exist in the case of treaties of peace, and whether if so it exists equally in the case of treaties akin to a treaty of peace, or whether in both or either of these cases interference with private rights can be authorized otherwise than by the legislature, are grave questions upon which their Lordships do not find it necessary to express an opinion. Their Lordships agree with the Court below in thinking that the allegations contained in the statement of defence do not bring the case within the limits of the proposition for which alone the appellant's counsel contended.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed with costs.



JOHNSTONE v. PEDLAR, [1921] 2 A. C. 262

HOUSE OF LORDS

The following statement of facts is taken from the judgment of Viscount Finlay.—My Lords, the appellant in this case is the Chief Commissioner of the Dublin Metropolitan Police. He was the defendant in an action in which the respondent sued for the detention of 124*l.* in cash and a cheque for 4*l.* 15*s.* 6*d.* The respondent was convicted of being engaged in illegal drilling and there was found upon him at the time of his arrest the cash and cheque now claimed. The respondent is a naturalised citizen of the U.S.A. and the detention is alleged by the appellant to be an act of State. A certificate given by the Chief Secretary for Ireland was put in at the trial and is as follows: 'It appearing that Richard H. Boyle, Inspector of the Dublin Metropolitan Police, on 1st May 1918, arrested one William Pedlar (an alien) at Blackrock, co. Dublin, on a Warrant dated the 1st May 1918, signed by Mr. Swifte, K.C., Divisional Justice, for an offence under the Defence of the Realm

Act, and that the said Inspector Boyle searched the said William Pedlar after said arrest, and that there were found upon him (*inter alia*) a sum of 124*l.* cash and a cheque for 4*l.* 15*s.* 6*d.*, both of which were taken and detained by an officer of the Crown (who still detains same) as an Act of State for the Defence of the Realm and for the prevention of crime. Now, I, the Right Hon. Ian MacPherson, M.P., Chief Secretary for Ireland, in my capacity as a Minister of the Crown and officer of State and official superior of the said officer, do hereby formally ratify, adopt and confirm the said seizure of the said cash and cheque and the detention of same by the said officer on the grounds aforesaid. Dated this 19th day of June 1919. (Signed) IAN MACPHERSON.'

The action was tried before Pim J., with a jury. The learned judge, after argument, directed the jury to find for the defendant. The divisional Court, consisting of Dodd, Gordon and Moore JJ., dismissed a motion on behalf of the plaintiff that the verdict and judgment should be set aside. The Court of Appeal were divided in opinion. The Master of the Rolls held that the appeal should be dismissed, being of opinion that the plaintiff was in the position of an alien enemy and that no action was maintainable in respect of the seizure of the cash and cheque, as that had been adopted by the Crown as an act of State. Ronan and O'Connor L.JJ., however, held that as a subject of a State at peace with His Majesty, the plaintiff was in the position of a friendly alien, against whom the defence of act of State could not be raised. In accordance with the opinion of the majority of the Court the appeal was allowed and judgment was entered for the plaintiff for 124*l.* and the delivery up to him of the cheque.

On the present appeal your Lordships are asked to restore the judgment of Pim J.

VISCOUNT CAVE.—My Lords, counsel for the appellant contended for the broad proposition that, where the personal property of an alien friend resident in this country is seized and detained by an officer of the Crown, and his act is adopted and ratified by the Crown as an act of State, the alien is without legal remedy. In my opinion this proposition cannot be sustained.

When a wrong has been done by the King's officer to a British subject, the person wronged has no legal remedy against the Sovereign, for 'the King can do no wrong'; but he may sue the King's officer for the tortious act, and the latter cannot plead

the authority of the Sovereign, for 'from the maxim that the King cannot do wrong it follows, as a necessary consequence, that the King cannot authorize wrong': *Tobin v. The Queen*, (1864) 16 C. B. (N.S.) 310; *Feather v. The Queen*, (1865) 6 B. & S. 257, 295. On the other hand, where the person injured is an alien resident abroad, the above rule does not apply; and if the act causing the injury is adopted by the Sovereign as an act of State, the alien is without redress except by diplomatic action taken through the Government of his own country: *Buron v. Denman*, (1848) 2 Ex. 167; *Secretary of State for India v. Kamachee Boye Sahaba*, (1859) 13 Moo. P. C. 22.

But there is a third case—namely, where the person aggrieved in an alien and resident here; and I think that it is the established law that such a case falls within the first and not within the second of the above categories. In early times an alien had no rights in public law, and in private law his rights were much restricted. It was laid down by Littleton (s. 198) that an alien could bring no action, real or personal, but as regards an alien ami this proposition was disputed by Coke, who said: 'In this case the law doth distinguish betweene an alien, that is a subject to one that is an enemy to the King, and one that is subject to one that is in league with the King; and true it is that an alienemie shall maintaine neither reall nor personall action, *donec terræ fuerint communes*, that is, untill both nations be in peace; but an alien that is in league, shall maintain personall actions; for an alien may trade and traffique, buy and sell, and therefore of necessity he must be of ability to have personall actions; but he cannot maintaine either reall or mixt actions.'¹ Co. Litt. 129b. Certainly Littleton's rule was not recognized by the law merchant or in Chancery; and before the end of the sixteenth century it was established that at common law an alien friend could own chattels and sue on a contract or in tort in the same manner as a British subject: *Dyer* 2b. No doubt a friendly alien is not for all purposes in the position of a British subject. For instance, he may be prevented from landing on British soil without reason given: *Musgrove v. Chun Teeong Toy*, [1891] A. C. 272; and having landed, he may be deported, at least if a statute authorizes his expulsion: *Attorney-General for Canada v. Cain*, [1906] A. C. 542; and see *In re Adam*, (1897) 1 Moo. P. C. 460. But so long as he

¹ Because he could not (until 1870) own land in England [Ed.].

remains in this country with the permission of the Sovereign, express or implied, he is a subject by local allegiance with a subject's rights and obligations: *Hale's Pleas of the Crown*, vol. i., p. 542; *Calvin's Case*, (1608) 7 Rep. 6a; *De Jager v. Attorney-General of Natal*, [1907] A. C. 326; *Porter v. Freudenberg*: per Lord Reading C.J., [1915] 1 K. B. 857, 869, including the right to sue the King's officer for a legal wrong.

Some observations by Lord Kyllachy in *Poll v. Lord Advocate*, (1899) 1 F. 823, 827-8, if taken generally, might appear to be inconsistent with this view; but they were directed to the case of an alien who had been prevented from landing in Scotland and not to that of an alien resident there.

Further, an alien resident in this realm is entitled by statute to hold personal property here in the same manner in all respects as a natural-born British subject: *British Nationality and Status of Aliens Act*, 1914, s. 17; and it would be a serious derogation from that right if it were held that his property might be seized by an agent of the Crown without legal authority and without redress.

The above observations are sufficient to cover the present case, which your Lordships were invited to determine on broad lines. If it were necessary to go into the particular facts of this case, it would have to be considered whether the seizure by a police officer of money found on a person arrested within the realm can properly be described, even though ratified by a Minister, as an 'act of State'. It has been said that such an act must be done outside British territory (*Cobbett's Leading Cases*, vol. i., p. 18; See *Musgrave v. Pulido*, (1879) 5 App. Cas. 102, 112): and again that the expression 'act of State' denotes 'a catastrophic change constituting a new departure': per Moulton L.J. in *Salaman v. Secretary of State for India*, [1906] 1 K.B. 613, 640; but it is unnecessary in the present case to determine whether the meaning of the term is so restricted. It is enough to say that in this case the defence of 'an act of State' cannot prevail.

I should add that the judgment of O'Connor M.R. in the Court of Appeal was mainly founded upon the view that the right of a resident alien to protection is contingent on his observing the duty of allegiance while in the realm, and that the respondent, having been guilty of treasonable acts, had thereby forfeited his right to the protection of the King's Courts. But this question

was not raised in the defence, and (either for that reason or because a decision on the wider question was desired) was not seriously argued in your Lordships' House, and accordingly I think it best to express no opinion upon it.¹

For the reasons given above I am of opinion that this appeal fails and should be dismissed.

VISCOUNT FINLAY, LORD ATKINSON, LORD SUMNER, and LORD PHILLIMORE delivered judgments to the same effect.

Order of the Court of Appeal in Ireland affirmed and appeal dismissed with costs.

DUFF DEVELOPMENT CO. v. KELANTAN GOVERNMENT,
[1924] A. C. 797

HOUSE OF LORDS

VISCOUNT CAVE.—On July 15, 1912, the respondents, the Government of Kelantan (acting by the Crown Agents for the Colonies), entered into an agreement under seal with the appellants, the Duff Development Co., Ltd., whereby the Government of Kelantan granted to the company certain rights of mining, timber cutting and road making and other rights to be exercised in that State. The deed contained an arbitration clause, which incorporated the Arbitration Act, 1889.² Disputes having arisen as to the meaning and effect of the deed, the disputes were referred in accordance with the provisions of the arbitration clause to an arbitrator, who, on November 17, 1921, made an award whereby he made certain declarations in favour of the company and directed an inquiry as to damages and directed the Government of Kelantan to pay the costs of the arbitration and award. On December 22, 1921, the Government moved the Chancery Division of the High Court of Justice in England, under s. 11. of the Arbitration Act, 1889, to set aside the award on the ground of error in law appearing on the face of it; but this application was on March 23, 1922, dismissed with costs, a decision which was

¹ Lord Atkinson and Lord Sumner discussed this point, but were of opinion that the right to protection could not be forfeited *ipso facto*, and there was no evidence that the Crown had elected to withdraw it.

² This has nothing to do with international arbitration, but is a code of procedure, &c., to be observed in arbitration between private persons, and operating at municipal law [Ed.].

afterwards affirmed by the Court of Appeal and by this House, [1923] A. C. 895. On June 12, 1922, the company applied to the King's Bench Division of the High Court by originating summons under s. 12 of the Arbitration Act for leave to enforce the award, and an order to that effect was made by Master Bonner. On July 7, 1922, Master Ball, on the application of the company, made a garnishee order whereby certain moneys said to be owing to the Government of Kelantan from the Crown Agents for the Colonies were attached for payment of the taxed costs of the arbitration. On December 12, 1922, Master Jelf made an order, whereby he set aside the order made by Master Bonner and all proceedings under it, including the garnishee order made by Master Ball, and stayed all further proceedings in the matter on the ground that the Sultan of Kelantan was an independent sovereign ruler and the State of Kelantan was an independent sovereign State, and that the Court had no jurisdiction over the Sultan or the Government of Kelantan. An appeal against the order of Master Jelf was allowed by Roche J.; but on an appeal to the Court of Appeal that Court reversed the decision of Roche J., and restored the order of Master Jelf. Hence the present appeal.

My Lords, on the hearing of the appeal before your Lordships two points were argued on behalf of the appellant company.

First, it was argued that the Government of Kelantan was not an independent sovereign State, so as to be entitled by international law to the immunity against legal process which was defined in *The Parlement Belge*, (1880) 5 P. D. 197. It has for some time been the practice of our Courts, when such a question is raised, to take judicial notice of the sovereignty of a State, and for that purpose (in any case of uncertainty) to seek information from a Secretary of State; and when information is so obtained the Court does not permit it to be questioned by the parties. Information of this character was obtained from a Secretary of State and accepted without question in *Taylor v. Barclay*, (1828) 2 Sim. 218, and *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149; and those cases were followed in *Foster v. Globe Venture Syndicate*, [1900] 1 Ch. 811, and in *The Gagara*, [1919] P. 95. In the present case the requisite inquiry was addressed by Master Jelf (while the summons to enforce the award was pending before him) to the

Secretary of State for the Colonies, and in answer to this inquiry the Under Secretary replied as follows:

‘Downing Street,
‘9th October, 1922.

‘SIR,

‘With reference to your letter of the 31st July, I am directed by Mr. Secretary Churchill to inform you, in reply to your letter of the 18th July, that Kelantan is an independent State in the Malay Peninsula and that His Highness the Sultan Ismail bin Almerhum Sultan Mohamed IV. is the present Sovereign Ruler thereof.

‘2. Prior to the year 1909 the relations between Siam and Kelantan were regulated by an agreement signed in 1902 a copy of the English text of which is enclosed. Such rights as the King of Siam possessed over Kelantan were transferred to His Majesty the King by a treaty signed at Bangkok on the 10th of March 1909. A copy of this treaty is enclosed.

‘3. Not all the rights possessed by the King of Siam were ever exercised by His Britannic Majesty and the present relations between His Majesty the King and the Sultan of Kelantan which are those of friendship and protection are regulated by an agreement signed on the 22nd of October 1910. A copy of this agreement is enclosed. His Majesty the King does not exercise or claim any rights of sovereignty or jurisdiction over Kelantan.

‘4. I am to explain that in 1910 the Rajah of Kelantan with His Majesty’s approval assumed the title of Sultan and is now Sultan and Sovereign of the State of Kelantan.

‘5. The Sultan in Council makes laws for the Government of the State, and His Highness dispenses justice through regularly instituted Courts of Justice, confers titles of honour and generally speaking exercises without question the usual attributes of Sovereignty.

‘I am,

‘Sir,

‘Your most obedient servant,

(Signed) J. MASTERTON SMITH.

‘Master Jelf,

‘Supreme Court.’

The documents enclosed in this reply show that Kelantan had formerly been recognized as a dependency of Siam; that the Siamese Government had by the Treaty of Bangkok transferred to the British Government all its rights over Kelantan; and that by the agreement dated October 22, 1910, referred to in the letter

from the Secretary of State, the Rajah (afterwards styled the Sultan) of Kelantan had engaged to have no political relations with any foreign power except through the medium of His Majesty the King of England and to follow in all matters of administration (save those touching the Mohammedan religion and Malay custom) the advice of an adviser appointed by His Majesty. Upon these documents it was argued on behalf of the appellants that, although the Secretary of State had stated in the letter of October 9, 1922, that Kelantan was an independent State and its Sultan a sovereign ruler, this statement must be held to be qualified by the terms of the documents enclosed with the letter; that, taking the information as a whole, the true result was that Kelantan was not an independent but a dependent State; and accordingly that the Sultan was not immune from process in the English Courts.

My Lords, in my opinion this argument cannot prevail. Vattel (*Droit des Gens*, ed. Pradier-Fodéré (1863), vol. i., ch. 1) defines a sovereign State as a nation which governs itself by its own authority and laws without dependence on any foreign power (s. 4); but he also lays it down (s. 5) that a State may without ceasing to be a sovereign State be bound to another more powerful State by an unequal alliance, and he adds:—

‘Les conditions de ces alliances inégales peuvent varier à l’infini. Mais quelles qu’elles soient, pourvu que l’allié inférieur se réserve la souveraineté ou le droit de se gouverner par lui-même, il doit être regardé comme un État indépendant, qui commerce avec les autres sous l’autorité du droit des gens.

‘Par conséquent un État faible qui, pour sa sûreté, se met sous la protection d’un plus puissant et s’engage, en reconnaissance, à plusieurs devoirs équivalents à cette protection, sans toutefois se dépouiller de son gouvernement et de sa souveraineté, cet État, dis-je, ne cesse point pour cela de figurer parmi les souverains qui ne reconnaissent d’autre loi que le droit des gens.’

No doubt the engagements entered into by a State may be of such a character as to limit and qualify, or even to destroy, the attributes of sovereignty and independence: Wheaton, 5th ed., p. 50; Halleck, 4th ed., p. 73; and the precise point at which sovereignty disappears and dependence begins may sometimes be difficult to determine. But where such a question arises it is desirable that it should be determined, not by the Courts, which

must decide on legal principles only, but by the Government of the country, which is entitled to have regard to all the circumstances of the case. Indeed, the recognition or non-recognition by the British Government of a State as a sovereign State has itself a close bearing on the question whether it is to be regarded as sovereign in our Courts. In the present case the reply of the Secretary of State shows clearly that notwithstanding the engagements entered into by the Sultan of Kelantan with the British Government that Government continues to recognize the Sultan as a sovereign and independent ruler, and that His Majesty does not exercise or claim any rights of sovereignty or jurisdiction over that country. If after this definite statement a different view were taken by a British Court, an undesirable conflict might arise; and, in my opinion, it is the duty of the Court to accept the statement of the Secretary of State thus clearly and positively made as conclusive upon the point.

But secondly it is argued on behalf of the appellant company that, assuming the Sultan of Kelantan to be a sovereign ruler, he has waived his sovereignty and submitted to the jurisdiction of the High Court—and that in two ways—namely, first by assenting to the arbitration clause in the deed of 1912, and secondly by applying to the Court to set aside the award of the arbitrator.

Then has the respondent by agreeing to the arbitration clause in the deed of 1912 submitted to the jurisdiction so far as regards an application to the Court to enforce the award? The arbitration clause provides that 'this shall be deemed a submission to arbitration within the Arbitration Act 1889 or any statutory modification or re-enactment thereof for the time being in force, the provisions whereof shall apply so far as applicable.' I think the effect of this provision is to incorporate in the deed the relevant provisions of the Arbitration Act, including the power given by the Act to either party on having an award made in his favour to make an application to the Court under s. 12 of the Act for leave to enforce the award, and the words 'so far as applicable' do not appear to me to qualify that right. If so, then the Sultan has in effect agreed to submit to the jurisdiction so far as to entitle the appellants to apply to the Court for leave to enforce an award against him and on leave being given to enforce it by the usual modes of execution; but the question remains whether this agreement to submit is equivalent to an actual submission. On full consideration I am

not satisfied that it is. I do not forget the cases in which it has been held that a person not otherwise liable to the jurisdiction of a Court may make it a term of a contract that questions arising under it shall be decided by that Court, or those cases (such as *Montgomery v. Liebenthal*, [1898] 1 Q. B. 487,) in which it has been held that a person outside the jurisdiction may agree that service of process upon a person within the jurisdiction shall be good service upon himself. But in the case of a foreign sovereign something more than this is required. It was held in *Mighell v. Sultan of Johore*, [1894] 1 Q. B. 149, that a submission by such a sovereign, to be effective, must take place when the jurisdiction is invoked and not earlier, and that when a question of jurisdiction is raised by him there can be no inquiry by the Court into his conduct or actions prior to that date; and I see no reason for doubting the correctness of that decision. If therefore a sovereign having agreed to submit to jurisdiction refuses to do so when the question arises, he may indeed be guilty of a breach of his agreement, but he does not thereby give actual jurisdiction to the Court.

There remains the question whether the Sultan by applying under s. 11 of the Act to set aside the award impliedly submitted to an application under s. 12 of the Act to enforce it. In my opinion, he did not. By his application under s. 11 he endeavoured to get rid of the award and left it to the Court to decide his rights in this respect; but the application for leave to enforce the award is a new proceeding, and though connected with the earlier application is distinct from it. In my opinion, therefore, this argument also fails.

Upon the above view of the case a question which was debated during the argument—namely, whether a foreign sovereign who submits to judgment thereby submits to execution under the judgment upon his property in this country—does not arise for decision; and accordingly I express no opinion upon that question.

For these reasons I am of opinion that this appeal fails and should as against the respondent Government be dismissed with costs, such costs to be set off against any sum which may be owing by the respondent Government to the appellants.

VISCOUNT FINLAY, LORD DUNEDIN, and LORD SUMNER delivered judgments to the same effect. LORD CARSON dissented as to whether the Government of Kelantan had submitted to the jurisdiction of the Court.

Order of the Court of Appeal affirmed, and appeal dismissed with costs.

X

THE POWERS OF THE CROWN IN TIME OF WAR

It is probable that the Crown was once all-powerful in time of war; for the conduct of war, no less than foreign policy, is 'matter of state'. Thus the Tudor and early Stuart monarchs exercised without statutory authority powers as wide as those which the Crown exercised in the late war by virtue of Acts of Parliament. They prohibited or licensed trading with the enemy, they requisitioned property both in land and ships, they kept discipline among their troops, and they executed martial law in time of insurrection. But these acts, being 'acts of State', were often, though not invariably, withdrawn from the cognizance of the Courts of Common Law. The Crown, however, lost as well as gained by this immunity. For although its executive acts escaped the interference of the judges, its power to do them did not in all cases receive judicial acknowledgement. It would accordingly be difficult at the present day to find authority for the view that such acts can legally be done under the Royal Prerogative.

In modern times, and especially during the late war, statutes have been passed conferring upon the Crown special powers to be exercised in time of war, and such powers are of course beyond dispute. But the statutes in point do not always make it clear to what extent they have superseded the Prerogative. Thus there was room for argument in the *De Keyser Case* (p. 325 below) that some portion at least, if not the whole, of the prerogative to requisition land had been left intact by the Defence Acts and the Defence of the Realm Acts and Regulations. It was held in that case that the statutes covered the whole ground formerly occupied by the prerogative; but the House of Lords was not at all convinced that the prerogative contended for by the Attorney-General had ever in fact existed. They doubted whether it was ever more than the common law right enunciated in the *Case of Saltpetre* (p. 325 below). On the other hand it is probable that a prerogative to requisition ships still exists (see *The Broadmayne*, [1916] P. 67, and Holdsworth in 35 L. Q. R. 12).

Similarly, it is evident that Military Law, that is, the law by

which discipline is maintained in the Army, is now entirely a matter of statute: for the Army Act occupies the whole of the ground formerly claimed by the Prerogative; it deals exhaustively with military discipline (see pp. 335-40 below).

Even trading with the enemy was in the late war made the subject of Acts of Parliament. Yet there is no doubt that the Crown possesses a prerogative to forbid trading with the enemy and to dispense with the prohibition. The prohibition results automatically from the declaration of war, and the power to declare war is an essential portion of the Crown's prerogative in foreign affairs. 'The force of a declaration of war,' said Willes J. in *Esposito v. Bowden*, (1857) 7 E. & B. at p. 781,

'is equal to that of an Act of Parliament prohibiting intercourse with the enemy except by the Queen's licence. As an Act of State, done by virtue of the Prerogative exclusively belonging to the Crown, such a declaration carries with it all the force of law.'

The dispensing power is thus explained and justified by Sir William Scott in *The Hoop*, (1799) 1 C. Rob. at p. 199:

'By the law and constitution of this country, the sovereign alone has the power of declaring war and peace—He alone therefore who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war.'

CASES

Extract from

THE CASE OF THE KING'S PREROGATIVE IN SALTPETRE,
(1607) 12 Co. Rep. 12

But when enemies come against the realm to the sea-coast, it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. And therefore by the common law, every man may come upon my land for the defence of the realm, as appears 8 Ed. 4. 28. And in such case on such extremity they may dig for gravel, for the making of bulwarks; for this is for the public, and every one hath benefit by it; but after the danger is over, the trenches and bulwarks ought to be removed, so that the owner shall not have prejudice in his inheritance: and for the commonwealth, a man shall suffer damage; as, for saving of a city or town, a house shall be plucked down if the next be on fire: and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action, as it is said in 3 H. 8. fol. 15. And in this case the rule is true, *Princeps et respublica ex justa causa possunt rem meam auferre*.

ATTORNEY GENERAL v. DE KEYSER'S ROYAL HOTEL,
[1920] A. C. 508

HOUSE OF LORDS

LORD MOULTON.—My Lords, the present appeal is in the matter of Petition of Right presented by De Keyser's Royal Hotel, Ltd., the owners of the well-known hotel of that name, for compensation for the compulsory occupation of certain parts of their premises by the War Office acting in the name and on behalf of the Crown for purposes connected with the defence of the realm during the late war. The Crown contests the right of the suppliants to compensation for such compulsory occupation, and pleads that it was an exercise of the Royal Prerogative, and gave no right of compensation.

The facts of the case are not substantially in dispute, the real issue being a question of law of great and general importance. I shall therefore deal very shortly with the evidence as to what actually took place at the time when occupation of the premises was taken by the Crown.

In April, 1916, the authorities at the War Office came to the conclusion that the premises in question were the most suitable for housing the heads of the department having charge of the Army Air Service, and accordingly they, by a letter dated April 18, 1916, instructed the Office of Works to make immediate arrangements to acquire them for that purpose. Negotiations were thereupon commenced between the Office of Works and Mr. Whinney (who then represented the suppliants' interests) for such acquisition. It was at first proposed that they should be acquired voluntarily at an agreed rent, but as the parties differed as to the amount of this rent the Board of Works abandoned the negotiations, and informed Mr. Whinney that they were about to 'communicate with the War Office with a view to the total premises (excluding the shops) being requisitioned under the Defence of the Realm Acts in the usual manner.'

The War Office agreed to this course being taken, and on May 1 the Office of Works, by their direction, wrote to Mr. Whinney a letter, the material parts of which are as follows:—

'DE KEYSER'S ROYAL HOTEL, E.C.

'Dear Sir,

'I am instructed by the Army Council to take possession of the above property under the Defence of the Realm Regulations (excluding the shops, the other portions sub-let, and the wine cellars). . . . We do not propose to take possession until the 8th inst., but I shall be glad if you will accept this as formal notice of the Department's intention to take possession on that day.'

In accordance with this notice a representative of the War Office attended on the 8th inst., and took possession of the premises, which were forthwith occupied by the military authorities, and continued to be so occupied throughout the period of the war. It is in respect of this occupation that the suppliants claim compensation.

The representatives of the Crown have throughout insisted that possession was taken of the premises under the Royal Prerogative, and that therefore the suppliants were not entitled as of right to

any payment by way of compensation, but that their sole remedy was to apply to a certain Commission, named the Defence of the Realm Losses Commission, for an *ex gratia* allowance in respect of the losses that they would suffer by the occupation of their premises on behalf of the Crown. This Commission was appointed by Royal Order on March 31, 1915, 'to inquire and determine and to report what sums (in cases not otherwise provided for) ought in reason and fairness to be paid to applicants . . . in respect of direct and substantial loss and damage sustained by them by reason of interference with their property or business in the United Kingdom through the exercise by the Crown of its rights and duties in the Defence of the Realm.' It is evident that the existence of the powers of this Commission can have no bearing upon the question raised by this Petition of Right. Its jurisdiction is restricted to 'cases not otherwise provided for,' and the whole basis of this Petition of Right is that the case is already provided for. The suppliants claim that they have a legal right to the compensation, and it is that right which they are seeking to enforce by this petition.

In the petition the suppliants put forward an alternative ground for their claim—namely, that the premises were given up to the Government by them voluntarily under circumstances which would in law imply a contract on the part of the Crown to pay for use and occupation of the premises. Without discussing the conditions under which such a contract may be implied, it suffices to say that in my opinion it is abundantly clear that the premises were not surrendered voluntarily but were taken compulsorily. Both parties in their letters written at the time treat it as a case of commandeering, as it in fact was, and Mr. Whinney protested strongly against the action of the Government in the matter. In short, he did everything to prevent their taking the premises short of refusing to give them up unless the Government used physical force to obtain an entry. Had he gone further in his resistance than he actually did he would clearly have put himself in the wrong, for whatever be the suppliants' right as to compensation, the Government were undoubtedly entitled to commandeer the premises if they needed them for the purposes of the defence of the realm.

In deciding the issues raised herein between the Crown and the suppliants, the first question to be settled in the present case

might be, to my mind, treated as a question of fact—namely, Was possession in fact taken under the Royal Prerogative or under special statutory powers giving to the Crown the requisite authority? Regarded as a question of fact, this is a matter which does not admit of doubt. Possession was expressly taken under statutory powers. The letter of May 1, 1916, from the representative of the Army Council to Mr. Whinney says: 'I am instructed by the Army Council to take possession of the above property under the Defence of the Realm Regulations.' It was in response to this demand that possession was given. It is not competent to the Crown, who took and retained such possession, to deny that their representative was acting under the powers given to it by these Regulations, the validity of which rests entirely on statute.

It was not a matter of slight importance whether the demand for possession purported to be made under the statutory powers of the Crown or the Royal Prerogative. Even the most fervent believer in the scope of the Royal Prerogative must admit that the powers of the Crown were extended by the Defence of the Realm Consolidation Act and the Regulations made thereunder. It was for that purpose that the Act was passed and the Regulations made. But even if that were not so there was a manifest advantage in proceeding under the statutory powers. It rendered it impossible for the subject to contest the right of the Crown to take the premises by the exercise of the powers given by the statute. The statutory powers of the Crown were formulated in the Regulations in a manner which was beyond mistake. For example, the Regulations gave to the Crown the power 'to take possession of any buildings.' Mr. Whinney therefore was clearly bound to surrender the premises when demanded. It would have been a very different matter had the demand been made under the Royal Prerogative. This litigation itself is enough to show how debatable a proposition it would have been if the claim had been made that the ancient prerogative of the Crown covered the taking of a hotel in London for the more comfortable housing of a military staff and its clerks and typewriters. All such questions were put at rest by the Legislature giving express statutory authority by the Regulations. There could henceforward be no doubt that the Crown possessed the powers formulated in the Regulations, and this was the object of the legislation. But when

the Crown elects to act under the authority of a statute, it, like any other person, must take the powers that it thus uses cum onere. It cannot take the powers without fulfilling the condition that the statute imposes on the use of such powers.

The Defence of the Realm Consolidation Act, 1914, commenced by enacting that 'His Majesty in Council has power to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and Army Council and of the Members of His Majesty's forces and other persons acting on his behalf.' It then goes on to particularize certain subjects to which these Regulations may relate, and in sub-s. 2 it deals with the question of the acquisition of land as follows:—

'Any such regulations may provide for the suspension of any restrictions on the acquisition or user of land or the exercise of the power of making bye-laws, or any other power under the Defence Acts, 1842 to 1875, or the Military Lands Acts, 1891 to 1903.'

The Defence Act, 1842 (which may be taken to represent the whole of the Defence Acts inasmuch as the later Acts only modify it in details which do not concern the matter in this case), is the last of a series of Acts regulating the acquisition of lands and interests in land for purposes of the defence of the realm. These Acts commence in 1708, and occur at intervals up to 1842. At first they related only to land for fortifications at places mentioned in the Act, but later they became more general in their character, and authorized the Crown to select suitable land and acquire it. In all cases compensation was given to the owners for the land taken. But it is not necessary to dwell on their provisions, seeing that the Defence Act, 1842, repealed all such existing Acts and laid down general provisions which have regulated since that time the procedure for the acquisition by the Crown of land for such purposes.

This Act gives very wide powers to the Crown. It has unrestricted powers of selection of the necessary lands, buildings, etc., to be taken. It contemplates in the first instance voluntary purchase, but, if that cannot be arranged, then the lands, etc., may be acquired compulsorily subject to certain certificates being obtained as to the necessity or expediency of the acquisition or in case of actual invasion. I am satisfied that it enables the Crown to acquire either the property or the possession or use of it as it may need.

In all cases compensation is to be paid by the Crown, the amount to be settled by a jury.

The Regulations and the Act under which they are made must, of course, be read together, and it is in my opinion a sound inference from the language of sub-s. 2 that the Legislature intended that, so far as the acquisition or user of land was concerned, the Regulations should take the form of action under the Defence Act, 1842, facilitated by the suspension of some or all of the restrictions which it imposes. The particular provisions relating to the taking of land or buildings are to be found in s. 2 of the Regulations. They empower the military authorities to take possession of any land or of any buildings where for the purposes of the defence of the realm it is necessary so to do. These are very wide powers, but so general are the powers of the Defence Act, 1842, that they would be attained by simply suspending the restrictions therein contained and allowing its powers to be put in force without them. Reading therefore this Regulation with sub-s. 2 of the Act, I think it is clear that in the case of acquisition and user of land under the Regulations we ought to consider them as authorizing action being taken under the Defence Act, 1842, save that no restrictions therein appearing are to be enforced. The duty of paying compensation cannot be regarded as a restriction. It is a consequence of the taking, but in no way restricts it, and, therefore, as the acquisition is made under the Defence Act, 1842, the suppliants are entitled to the compensation provided by that Act.

On these grounds therefore I am of opinion that the suppliants are entitled to our judgment in this appeal. But it would be unsatisfactory in a case of such general importance to leave unconsidered the question whether, apart from the fact that the Crown expressly purported to be acting under powers given to it by statute, the suppliants' claim could be maintained.

To decide this question one must consider the nature and extent of the so-called Royal Prerogative in the matter of taking or occupying land for the better defence of the realm. I have no doubt that in early days, when war was carried on in a simpler fashion and on a smaller scale than is the case in modern times, the Crown, to whom the defence of the realm was entrusted, had wide prerogative powers as to taking or using the lands of its subjects for the defence of the realm when the necessity arose.

But such necessity would be in general an actual and immediate necessity arising in face of the enemy and in circumstances where the rule *Salus populi suprema lex* was clearly applicable. The necessity would in almost all cases be local, and no one could deny the right of the Crown to raise fortifications on or otherwise occupy the land of the subject in the face of the enemy, if it were necessary so to do.

Nor have I any doubt that in those days the subjects who had suffered in this way in war would not have been held to have any claim against the Crown for compensation in respect of the damage they had thus suffered. It must not be forgotten that in those days the costs of war were mainly borne by the Royal Revenues, so that the King himself was the heaviest sufferer. The limited and necessary interference with the property of the subjects, of which I have spoken, would have been looked upon as part of the damage done by the war which it had fallen to their lot to bear, and there is no reason to think that anyone would have thought that he had a claim against the Crown in respect of it. Certainly no trace of any such claim having been put forward is to be found.

This state of things lasted for several centuries. The records of the preparations made by Queen Elizabeth to resist the attack of the Spanish Armada, which are contained in the papers in this case, show that it was in full force in her time. I am not surprised that the careful (though necessarily incomplete) researches into the Public Records have found no precedent for the claim as of right against the Crown, for acts done under its prerogative in occupying or using land under the stress of such a necessity as I have spoken of, and I do not think that a complete investigation would have met with greater success.

But in the last three centuries very important changes have occurred, which have completely altered the position of the Crown in such matters. In the first place, war has become far more complicated, and necessitates costly and elaborate preparations in the form of permanent fortifications, and otherwise, which must be made in times of peace. In the second place, the cost of war has become too great to be borne by the Royal Revenues, so that the money for it has to come from the people through the Legislature, which long ago assumed, and has since retained, the command of all national resources. In the third place, the feeling that it was equitable that burdens borne for the good of the nation should be

distributed over the whole nation and should not be allowed to fall on particular individuals has grown to be a national sentiment. The effect of these changes is seen in the long series of statutes relating to the occupation of land for the purposes of fortifications or otherwise for national defence, to which I have already referred and which cover the last two centuries. In all these Acts provision was made for compensation to the individual whose lands were taken or used, and indeed there is clear evidence that for many years, prior to the first of these statutes, the Crown acted on this principle. It is not necessary to examine these Acts in detail. They were mostly local in their operation and frequently temporary, and usually related to specific fortifications which it was proposed to erect.

But towards the beginning of the last century the Acts take on a more general and permanent form, and eventually they culminate in the Defence Act, 1842, which gives to the Crown, through its properly appointed officials, the widest possible powers of taking land and buildings needed for the defence of the realm under a minutely defined procedure set out in the Act. It contemplates as I have already said that the acquisition shall, as a rule, be by agreement, but it gives ample powers of compulsory acquisition if the necessity be duly vouched, or in case of an actual invasion. In all cases compensation for the taking or using of the land by the Crown is to be assessed by a jury who (in the words of the Act) have to find 'the compensation to be paid, either for the absolute purchase of such lands, buildings, or other hereditaments, or for the possession or use thereof, as the case may be.'

This Act was not limited either in time or place, and with small modifications, which are not material for our present purpose, is still in force.

What effect has this course of legislation upon the Royal Prerogative? I do not think that it can be said to have abrogated that prerogative in any way, but it has given to the Crown statutory powers which render the exercise of that prerogative unnecessary, because the statutory powers that have been conferred upon it are wider and more comprehensive than those of the prerogative itself. But it has done more than this. It has indicated unmistakably that it is the intention of the nation that the powers of the Crown in these respects should be exercised in the equitable manner set forth in the statute, so that the burden

shall not fall on the individual, but shall be borne by the community.

This being so, when powers covered by this statute are exercised by the Crown it must be presumed that they are so exercised under the statute, and therefore subject to the equitable provision for compensation which is to be found in it. There can be no excuse for reverting to prerogative powers simpliciter—if indeed they ever did exist in such a form as would cover the proposed acquisition, a matter which is far from clear in such a case as the present—when the Legislature has given to the Crown statutory powers which are wider even than anyone pretends that it possessed under the prerogative, and which cover all that can be necessary for the defence of the nation, and which are moreover accompanied by safeguards to the individual which are in agreement with the demands of justice. Accordingly, if the commandeering of the buildings in this case had not been expressly done under statutory powers, I should have held that the Crown must be presumed to have acted under these statutory powers, and thus given to the subject the statutory right to compensation.

In the argument for the Crown reference was made to the Defence of the Realm (Acquisition of Land) Act, 1916. This Act was passed subsequently to the taking of the suppliants' lands, and therefore has no bearing on the question before this House. There is nothing in it which purports to take away any right already acquired by the suppliants, and, if it modifies in any way the quantum of the compensation, that is a matter for the tribunal which will have to assess it, and is not relevant to the present appeal. I am therefore of opinion that the suppliants are entitled to the declaration in the form approved of by the Court below, and that this appeal should be dismissed with costs.

LORD DUNEDIN, LORD ATKINSON, LORD SUMNER, and LORD PARMOOR delivered judgments to the same effect.

Order of the Court of Appeal confirmed, and appeal dismissed.

XI

MILITARY LAW, THE MAINTENANCE OF ORDER, AND MARTIAL LAW

SERIOUS difficulties arise with regard to martial law, the law of war properly so called. Here, as is often the case, English legal terminology is confusing and inexact. The term martial law is used to represent at least three different things, and any combination of them. Originally (Maitland, *Constitutional History*, p. 266) the term probably meant 'the law of the Marshal', and only later acquired the meaning 'law of war'. As such, it included that law, other than common law, by which the conduct of soldiers was regulated in time of war, the law enforced by the conqueror of a foreign country, and the peculiar system of legal relations which arise between the military and the civilian subjects of the King in time of insurrection or civil war. The writers of the seventeenth century hardly differentiated between these concepts, nor was there urgent need to do so. Jurisdiction in all three cases was vested in the same court, that of the Constable and Marshal; the validity of that jurisdiction depended in every case on the same considerations: they stood or fell together. Thus, when the Petition of Right forbade the execution of martial law within the realm, it meant not only martial law of the third variety above mentioned, but of the first also. If the prohibition was meant to apply to peace only, as some have surmised, then not only was the prerogative left to maintain discipline in time of war, but also that of executing martial law against rebels and traitors, if it had ever existed.

In 1689 the first Mutiny Act put the law relating to the maintenance of discipline in the standing army on a statutory basis, and this in time became what we now call Military Law; but that term came into vogue only at the end of the eighteenth century, and long after that period the older term Martial Law is used interchangeably with it. It is essential to the proper understanding of Martial Law at the present day, that we should separate Military Law clearly from it. Military Law then will first receive attention. Some writers have denied the existence of a special martial law which the Crown may execute in time of insurrection,

and have maintained its identity with the common law right and duty of every subject to use force to put down force and restore order. Following, therefore, the process of working from the known to the unknown, we shall next consider the comparatively simple subject of the maintenance of order, before attempting to answer the really difficult question whether or no there is such a thing as Martial Law, apart from Military Law and the powers ordinarily available for the Maintenance of Order.

A.

MILITARY LAW

Military Law to-day rests entirely on the Army Act and the Air Force Act. These Acts, unlike the Naval Discipline Act, are not permanent, but must be brought into force afresh each year by the Army and Air Force (Annual) Act. The importance of this provision for annual renewal is sufficiently explained by Dicey (L. C. 442). The constitutional lawyer is interested, not in the contents of military law, but in its relation to the law of the land, and the ensuing effect upon the legal status of the individual soldier.

The following propositions may be laid down:

(1) The soldier does not by his enlistment divest himself of the character of citizen. He is still subject to all the duties and has all the rights of the ordinary citizen, except in so far as they have been expressly altered by statute. Thus, to quote the words of Lord Loughborough in *Grant v. Gould*, (1792) 2 H. Bl. at p. 98:

'Martial law such as it is described by Hale, and such also as it is marked by Mr. Justice Blackstone, does not exist in England at all. Where martial law is established, and prevails in any country, it is of a totally different nature from that which is inaccurately called martial law, merely because the decision is by a court-martial, but which bears no affinity to that which was formerly attempted to be exercised in this kingdom, which was contrary to the constitution, and which has been for a century totally exploded. Where martial law prevails, the authority under which it is exercised, claims a jurisdiction over all military persons, in all circumstances. Even their debts are subject to enquiry by a military authority: every species of offence, committed by any person who appertains to the

army, is tried, not by a civil judicature, but by the judicature of the regiment or corps to which he belongs. It extends also to a great variety of cases, not relating to the discipline of the army, in those states which subsist by military power. Plots against the sovereign, intelligence to the enemy, and the like, are all considered as cases within the cognizance of military authority.

'In the reign of King William, there was a conspiracy against his person in Holland, and the persons guilty of that conspiracy were tried by a council of officers. There was also a conspiracy against him in England, but the conspirators were tried by the common law. And within a very recent period, the incendiaries who attempted to set fire to the Docks at Portsmouth, were tried by the common law. In this country, all the delinquencies of soldiers are not triable, as in most countries in Europe, by martial law; but where they are ordinary offences against the civil peace, they are tried by the common law courts. Therefore it is totally inaccurate to state martial law as having any place whatever within the realm of Great Britain. But there is by the providence and wisdom of the Legislature an army established in this country, of which it is necessary to keep up the establishment. The army being established by the authority of the Legislature, it is an indispensable requisite of that establishment that there should be order and discipline kept up in it, and that the persons who compose the army, for all offences in their military capacity, should be subject to a trial by their officers. That has induced the absolute necessity of a mutiny act accompanying the army. . . .

'It is one object of that act to provide for the army; but there is a much greater cause for the existence of a mutiny act, and that is, the preservation of the peace and safety of the kingdom: for there is nothing so dangerous to the civil establishment of a state, as a licentious and undisciplined army; and every country which has a standing army in it, is guarded and protected by a mutiny act. An undisciplined soldiery are apt to be too many for the civil power; but under the command of officers, those officers are answerable to the civil power, that they are kept in good order and discipline. All history and all experience, particularly the experience of the present moment, give the strongest testimony to this. The object of the mutiny act, therefore, is to create a court invested with authority to try those who are a part of the army, in all their different descriptions of officers and soldiers; and the object of the trial is limited to breaches of military duty. Even by that extensive power granted by the Legislature to his majesty to make articles of war, those articles are to be for the better government of his forces, and can extend no further than they are thought necessary to the regularity and due discipline of the army.'

(2) By his enlistment the soldier has also subjected himself to a special code of law, which completely regulates the relations of officers and soldiers in their military capacity. So, within the limits of their jurisdiction, Courts-martial decide without appeal to the ordinary Courts. Reason and common sense alike support a rule that military matters should be left as far as possible in the hands of specialists. But the rule also imposes certain limitations on the competence of civil courts. Thus a soldier cannot enforce in the civil courts a right which arises purely out of the military status conferred upon him by the Army Act (see the remarks made by Cockburn C.J. in *Re Mansergh*, (1861) 1 B. & S. at p. 408). So also a soldier cannot bring an action in a civil court in respect of any act done to him by his superior officer within the powers given to him by the Army Act, even though it be done maliciously and, it would seem, without reasonable and probable cause (*Dawkins v. Lord F. Paulet*, p. 341 below). This rule has been subjected to severe criticism (see, for instance, *Heddon v. Evans*, (1919) R. O'Sullivan, Special Report, at pp. 76-8), but there is much to be said for the argument of Lords Mansfield and Loughborough C.JJ. in delivering the judgment of the Exchequer Chamber in *Sutton v. Johnstone*, (1786) 1 T. R. at p. 549:

'A commander in chief has a discretionary power, by this military code, to arrest, suspend, and put any man of the fleet upon his trial. A court-martial alone can judge of the charge. But this military law hath foreseen that though it is necessary to give superiors great discretionary power, it may be abused to oppression: and therefore has provided against such abuse by the 33d article. A commander who arrests, suspends, and puts a man on his trial without a probable cause, is guilty within that article: but the same jurisdiction which tries the original charge, must try the probable cause; which in effect is a new trial. And every reason which requires the original charge to be tried by a military jurisdiction, equally holds to try the probable cause by that jurisdiction.'

The case of *Sutton v. Johnstone* arose out of the action of an admiral in putting one of his captains on his trial for disobedience to orders. The captain was acquitted by the court-martial, and thereupon brought a civil action for malicious prosecution against the admiral. Judgment was given in the plaintiff's favour in the court of first instance, but was reversed in the Exchequer Chamber on the ground that there was in actual fact probable cause for the

prosecution. But Lords Mansfield and Loughborough did in their judgment utter what they themselves admitted to be dicta, to the effect that no action will lie at the suit of a subordinate against his superior officer in respect of acts done by him in abuse of his authority; and they unfortunately supported this conclusion with arguments which have made the whole case 'the fountain of unceasing ambiguity' (per McCardie J. in *Heddon v. Evans*, at p. 72). This may be illustrated from the sweeping dictum of Kelly C.B. in *Dawkins v. Lord Rokeby*, (1878) L. R. 8 Q. B. at p. 271:

'With reference therefore to such questions which are purely of a military character the reasons of Lord Mansfield and the other judges in *Sutton v. Johnstone*, and the cases *In re Mansergh*, (1861) 1 B. & S. 400, and *Grant v. Gould*, (1792) 2 H. Bl. 69; *Barwis v. Keppel*, (1766) 2 Wils. K. B. 314; *Keighly v. Bell*, (1866) 4 F. & F. 763; *Dawkins v. Lord Rokeby*, (1866) 4 F. & F. 856; and *Dawkins v. Lord Paulet*, (1869) L. R. 5 Q. B. 94, are all authorities to show that cases involving questions of military discipline and military duty alone are cognisable only by a military tribunal and not by a court of law.'

It will be observed that no clear distinction is here drawn between acts done in abuse of military authority and acts in excess of it. But obviously there is such a distinction. Military courts-martial and military officers are not autocrats, to do as they please: they must obey the law of the land. As Lord Loughborough said in *Grant v. Gould* (at p. 100),

'This Court being established in this country by positive law, the proceedings of it, and the relation in which it will stand to the courts of Westminster Hall, must depend upon the same rules, with all other courts which are instituted, and have particular powers given them, and whose acts, therefore, may become the subject of application to the Courts of Westminster Hall for a prohibition. Naval Courts Martial, Military Courts Martial, Courts of Admiralty, Courts of Prize, are all liable to the controlling authority, which the Courts of Westminster Hall have from time to time exercised, for the purpose of preventing them from exceeding the jurisdiction given to them.'

That the same reasoning applies to the other Prerogative Writs, and in particular to Habeas Corpus, is shown by the decision of the Court of Queen's Bench in *In re Allen*, (1860) 30 L. J. (Q. B.) 38. But an imprisonment which is liable to be terminated by the issue of a writ of Habeas Corpus will also give rise to an action

for false imprisonment, and there is no ground for treating a false imprisonment differently from any other common law wrong. There are indeed cases of the eighteenth and early nineteenth centuries, which may be cited as authority for these propositions, but they are badly reported and not easily accessible; the leading modern authority is the long and encyclopaedic judgment of McCardie J. in *Heddon v. Evans*, to which, as reported by Mr. R. O'Sullivan in his book, *Military Law and the Supremacy of the Civil Courts* (London, Stevens & Sons, 1921), the reader's attention is directed.

'Upon the decisions as they stand,' said the learned judge, after reviewing all the authorities, 'my conclusions on the matter are these:

'Firstly, that the rule I have already stated as a matter of principle is sound, viz., a military tribunal or officer will be liable to an action for damages if, when acting in excess of or without jurisdiction, they or he direct that to be done to another military man, whether officer or private, which amounts to assault, false imprisonment, or other common law wrong, even though the injury inflicted purport to be done in the course of actual military discipline.

'Secondly, that if the act causing the injury to person or liberty be within jurisdiction and in the course of military discipline, no action will lie upon the ground only that the act has been done maliciously and without reasonable and probable cause.'

(3) Although a soldier remains subject to the common law duties of the ordinary citizen, the fact that he is a soldier influences the attitude of the Courts towards certain acts of his which bring him within the civil jurisdiction. They take account of his duties as a soldier to this extent, that they will not hold him criminally liable for an act done in obedience to an order given by his military superior, and not manifestly illegal at the time it was given. It would not, however, necessarily relieve him of civil responsibility (*Reg. v. Smith*, p. 348 below).

CASES

DAWKINS v. LORD F. PAULET, (1869) L. R. 5 Q. B. 94

QUEEN'S BENCH

MELLOR J.—This case was argued before my Lord Chief Justice, my Brother Lush, the late Mr. Justice Hayes, and myself, in Trinity Term last, and the judgment which I am about to deliver was entirely approved by my lamented friend, Mr. Justice Hayes.

I approach this subject with great diffidence, seeing that my Lord Chief Justice has arrived at an essentially different conclusion.

This is an action of libel brought by the plaintiff, who was a lieutenant-colonel in the army, holding a commission as captain in her Majesty's regiment of Coldstream guards, against the defendant, who held the office of major-general commanding the brigade of foot guards, of which the regiment of Coldstream guards formed a part. The alleged libels were contained in certain letters written and sent by the defendant to the adjutant-general, for the information of the commander-in-chief, enclosing and commenting upon letters sent by the plaintiff to him, and which the plaintiff required the defendant, as his superior officer, to forward to the adjutant-general. [*The substance of the defendant's plea was that he commented upon and forwarded the letters in the ordinary course of his military duty, as the plaintiff's superior officer, and as an act of military duty, and not otherwise or for any other reason.*]

To this plea the plaintiff replied, that the words in the declaration mentioned were written and published of *actual malice* on the defendant's part, and without any reasonable, probable, or justifiable cause, and not *bonâ fide*, or in the *bonâ fide* discharge of the defendant's duty as such superior officer as aforesaid. To this replication the defendant demurred, and, as one ground of demurrer, alleged that no action is maintainable in respect of words written and published under the circumstances stated in the plea, even if written or published maliciously and without reasonable or justifiable cause.

It is to be observed, that the replication admits the facts stated in the plea, namely, that the letters in question were written and published by the defendant in the ordinary course of his duty as

commanding officer to the adjutant-general, for the information of the commander-in-chief, *and as an act of military duty, and not otherwise, or for any other reason*, yet seeks to avoid the effect of that admission by the allegation that they were written and published of actual malice on the defendant's part, and without reasonable or justifiable cause, and not *bonâ fide* or in the *bonâ fide* discharge of the defendant's duty as such superior officer. I am of opinion that such replication is bad, and is no answer to the matters alleged in the plea.

If it was the defendant's duty to write such letters and to make such reports touching the defendant's conduct, qualifications, and fitness as an officer, which is admitted by the replication, I do not see how it makes the defendant's conduct actionable, because he did what it was his duty to do maliciously, and not *bonâ fide* in the discharge of his duty. The defendant, in substance, says, 'I did my duty, and nothing more than my duty,' to which the plaintiff replies, 'I admit that you wrote the letters and reports as an act of military duty, and not otherwise, but you did so maliciously, and without reasonable, or probable, or justifiable cause, and not *bonâ fide*.' It is difficult to comprehend how it could be without reasonable, or probable, or justifiable cause, *if done as an act of duty* which it is incumbent upon him to do. It is to be observed, that the replication contains no allegation that the statements contained in the reports were false to the defendant's knowledge, and I am clearly of opinion that, without such an allegation, the words 'without reasonable, or probable, or justifiable cause, and not *bonâ fide*,' are, in connection with the admissions in the replication, simply insensible and repugnant. I must not be taken to admit that, had such an allegation appeared on the record, it would have entitled the plaintiff to judgment on the demurrer, but it would have given rise to different considerations.

I apprehend that the motives under which a man acts in doing a duty which it is incumbent upon him to do, cannot make the doing of that duty actionable, however malicious they may be. I think that the law regards the doing of the duty, and not the motives from or under which it is done. In short, it appears to me, that the proposition resulting from the admitted statements on this record amounts to this: Does an action lie against a man for maliciously doing his duty? I am of opinion that it does not;

and therefore, upon the pleadings as they stand, we might give judgment for the defendant.

The Attorney General, however, did not rest the case on the effect of the admissions in the pleadings, but contended broadly that no action would lie at law against an officer of the army charged with duties such as those stated on the record, for the discharge of them. He likened the case of the defendant to that of the judges of courts of law, to grand jurymen, petty jurymen, and to witnesses, against whom no action lies for what they do in the course of their duty, however maliciously they may do it. He claimed the immunity for the defendant for acts done in the course of his duty on the highest grounds of policy and convenience. No judge, nor jurymen, nor witness, he said, could discharge his duty freely, if not protected by a positive rule of law from being harassed by actions in respect of the mode in which he did the duty imposed upon him, and he contended that the position of the defendant manifestly required the like protection to be extended to him, and to all officers in the same position; and there is, I think, little doubt that the reasons which justify the immunity in the one case, do in great measure extend to the other. How can a commander freely communicate his real opinions to the adjutant-general as to the conduct, qualifications, or fitness for particular duty of any officer under his command, if his opinion be prejudicial to such officer, under the dread of an action for libel, or other action, which, if he were not protected, might be brought against him by any dissatisfied subordinate officer who might consider himself aggrieved? To this it may be answered, that no action would lie, as his communication would be privileged, if made *bonâ fide* and without malice. On the other hand, it must be observed that, although his communication might be privileged under such circumstances, still cases might frequently occur in which the judge on a trial at law would have to submit to a jury the most difficult question of military discipline, such as whether orders disobeyed were proper orders for a commander to give, or given maliciously and not *bonâ fide*, or whether the opinion expressed as to the competence of a subordinate officer for particular duties was justifiable or not. The promotion of an incompetent man may cause the greatest disaster, and yet, if the person who has to make his report as to the fitness or unfitness of such officer is to do it under the idea that the opinion he expresses may

be overruled by a jury ignorant of such matters, how can he be expected to do it freely? The Attorney General relied not only upon the analogy he drew from the case of a judge, jurymen, or witness, but he cited, in support of his argument, the opinion of Lord Mansfield and Lord Loughborough, in the case of *Sutton v. Johnstone*, (1786) 1 T. R. 544; and there is no doubt that those eminent judges did, in the court of error, express an opinion in the analogous case of an action for a malicious prosecution of a naval officer by the commander-in-chief of a naval squadron before a naval court-martial that so such action could lie, and in the course of their observations they said (at pp. 549, 550), 'If this action be admitted, every acquittal before a court-martial will produce one. Not knowing the law, or the rules of evidence, no commander or superior officer will dare to act; their inferiors will insult and threaten them.' And, again, 'If every trial that is by court-martial is to be followed by an action, it is easy to see how endless the confusion, how infinite the mischief will be.' These considerations appear to me to apply à fortiori to a case like the present, in which the letters and reports complained of were written by the defendant in the performance of a positive duty, and for the purpose of obtaining an investigation of the matters therein alleged by a competent military tribunal.

It is to be observed, that the opinion expressed by Lords Mansfield and Loughborough, although of the greatest weight, and given after the fullest consideration, was not necessary to the judgment in that case, which actually proceeded on other grounds, and therefore does not amount to a decision binding us to declare that no such action will lie, and does not conclude us with reference to the present case, but the exposition of the law expressed in that opinion has been generally accepted, and referred to in other cases as a very weighty authority. It was evidently given after great consideration, and derives additional weight from the fact that it was delivered in a court of error, and after an argument displaying the greatest ability and research. It proceeds upon the principle that 'the law will rather suffer a private mischief than a public inconvenience.' It was observed by Eyre B., in delivering the opinion of the Court of Exchequer, (1786) 1 T. R. at p. 508, that the ground upon which the immunity from actions, enjoyed by judges and jurymen proceeds, is, that 'the law gives faith and credence to what they do, and therefore there must always, in

what they do, be cause for it, and there never can be any malice in what they do.' Crompton J., in *Fray v. Blackburn*, (1863) 3 B. & S. at p. 578, stated that the immunity of judges of the superior courts was established to secure their independence, and to prevent them being harassed by vexatious actions. It is manifest that the administration of justice would be paralyzed if those who are engaged in it were to be liable to actions upon the imputation that they had acted maliciously and not bonâ fide; and it is to be observed that this absolute privilege is not confined to the administration of justice in the superior courts, but it has been also applied in its fullest extent to judges of the county courts: *Scott v. Stansfield*, (1868) L. R. 3 Ex. 220; nor is it indeed confined to the administration of justice; for it is well established that members of parliament cannot be called in question out of parliament for anything they may say in parliament in the course of any proceedings in parliament, and, in like manner, ministers of the crown cannot, from reasons of the highest policy and convenience, be called to account in an action for any advice which they think right to tender to the Sovereign, however prejudicial such advice may be to individuals.

Do not these reasons of public policy and convenience strongly apply to the present case? Can the administrative duties discharged by officers of the army in the position of the defendant be liable to be reviewed by a jury in an action at law without producing the greatest mischief and public inconvenience? I shall presently shew that a special mode of redress for all officers in the army who consider themselves wronged by their superior officers in relation to the discipline and government of the army is expressly provided by the articles of war, and in that view how inconsistent it would be that the judgment of a military tribunal, familiar with the question, should be liable to be reversed, and a different result obtained by the verdict of a jury in an action at law upon the very same facts? It is true that a standing army was unknown to the common law, and was always looked upon with great jealousy by our ancestors, but it is now, and has been for many years, regulated by acts of parliament, and by articles of war framed under them which provide appropriate courts and suitable machinery, and there is now a secretary of state for war, expressly appointed by the crown, with a series of officers charged with particular duties and functions, all tending to the regulation and government of

her Majesty's forces, and I cannot but think that the analogies referred to do in principle apply to such a state of things.

Upon these considerations, and supported by the opinion of Lords Mansfield and Loughborough and that of other judges, I come to the conclusion that the present action will not lie.

There was another ground of great importance upon which the Attorney General insisted, and which strongly supports the opinions above expressed. He argued that the plaintiff, being at the time of the printing and publishing of the letters and reports an officer of the army, and the defendant being his commanding officer, and the letters and reports in question being matters simply relating to military duties and discipline, and to the administration of the army, the plaintiff, if he had ground of complaint in respect of them, was bound to make it to the tribunal specially provided by the mutiny act and articles of war relating thereto; and that it was the only tribunal to which a military officer could appeal in respect of such matters. There is no doubt that the 12th section of the articles of war does provide: 'That if any officer shall think himself wronged by his commanding officer, and shall upon due application made to him, not receive the redress to which he may consider himself to be entitled, he may complain to the general commanding-in-chief of our forces in order to obtain justice; who is hereby required to examine into such complaint, and either by himself, or by our secretary of state of war, to make his report to us thereupon in order to receive our further directions.' And it is also provided that all the provisions of the articles of war 'shall apply to every person who is, or shall be, commissioned or in pay as an officer.' It would seem to follow from the provisions thus made by the articles of war for a special mode of redress for every officer who may think himself wronged by his commanding officer, that it was intended that every officer aggrieved by any order or report made in the course of the administration of the army must follow the special mode of redress pointed out in the articles of war, and that in respect of any grievances or complaint arising out of such administration, he can have no redress in any other way. Certainly this view of the law is supported by the opinions of Lords Mansfield and Loughborough, expressed in the case of *Johnstone v. Sutton*, above referred to, in which it is said: 'Commanders in the day of battle must act upon delicate suspicion, upon the evidence of their own eye; they must give desperate

commands; they must require instantaneous obedience; in case of a general misbehaviour they may be forced to suspend several officers, and put others in their places. A military tribunal is capable of feeling all these circumstances, and understanding that the first, second, and third part of a soldier is obedience; but what condition will a commander be in, if upon the exercising of his authority he is liable to be tried by the common law judicature?' I think that these considerations tend strongly to shew that the legislature, in providing special means of redress for officers feeling themselves aggrieved by any exercise of ordinary military authority or duty, by establishing special tribunals for the purpose by the articles of war, did intend to preclude such officers from appealing to the ordinary tribunals in respect of such matters. This view is confirmed by the opinion of Willes J., in *Dawkins v. Lord Rokeby*, (1866) 4 F. & F. 841, upon which he nonsuited the plaintiff in an analogous action, and which, so far as I am aware, was not afterwards questioned, he is reported to have said as follows:—'With respect to military men, I beg to say that I cannot conceive anything more fatal to themselves, anything more fatal to the discipline or subordination of the army, if every officer who considers himself to have been slighted by his inferiors, or every officer aggrieved by his superiors, whom, having become a soldier, he has consented to submit to, should seek to undo their judgment before a tribunal which must necessarily have but slight acquaintance with those matters upon which it is called to pronounce an opinion. I have no doubt that this is law, and that it is that which is most beneficial to the community.' The cases of *Grant v. Gould*, (1792) 2 H. Bl. 69, and *Barwis v. Keppel*, (1766) 2 Wils. 314, strongly support the same view. In *Grant v. Gould* Lord Loughborough said (at p. 100): 'The object of the mutiny act, therefore, is to create a court invested with authority to try those who are a part of the army in all their different descriptions of officers and soldiers, and the object of the trial is limited to breaches of military duty. Even by that extensive power granted by the legislature to his Majesty to make articles of war, those articles are to be for the better government of his forces, and can extend no further than they are thought necessary to the regularity and due discipline of the army;' and in that case, prohibition being refused, Lord Loughborough further said (at p. 101), speaking of a military court-martial sitting under the articles of war: 'This

court being established in this country by positive law, the proceedings of it, and the relation in which it will stand to the courts in Westminster Hall, must depend upon the same rules with all other courts which are instituted, and have particular powers given to them.'

It appears to me that upon the ground that the defendant and the plaintiff were both officers in the army, the defendant being the superior officer, and both being bound by the articles of war, it was the duty of the plaintiff to adopt the remedy thereby provided with reference to the matters whereof he complains, and that he has no remedy at law in respect thereof. I am therefore of opinion that, upon all these grounds, our judgment must be for the defendant.

LUSH J. delivered a concurring, COCKBURN C.J. a strongly dissenting judgment.

Judgment for the defendant.

REG. v. SMITH, (1900) 17 Cape of Good Hope Supreme Court Reports 561

This was the first case heard before the Special Court established by Act 6 of 1900. The constitution of the Court was Mr. Justice Solomon (President), Mr. Justice Lange, and A. F. S. Maasdorp, Esq., Q.C. There was no jury.

The accused, who was charged with murder, formed one of a patrol, which left Naauwpoort one day in November 1899 under a certain Captain Cox and proceeded to the farm Jackalsfontein, in order to arrest certain occupants of the farm who were suspected of being in communication with the enemy, viz. the forces of the South African Republic and the Orange Free State. The enemy were known to be in the immediate neighbourhood; the undertaking was one of considerable danger, and delay was therefore undesirable. At the farm one of the bridles belonging to the farmer, Van der Walt, could not be found, and as it was wanted for the purpose of removing the farmer's son, on horseback, to British lines, one of the farm hands, a native named Dolley, was ordered to produce it. Dolley seems to have been dilatory, and when the accused reported this to Captain Cox he was ordered to shoot him

unless the bridle were promptly given up. Dolley still delayed, and thereupon accused levelled his rifle at him and fired the shot which killed him.¹

SOLOMON, Judge President, after reviewing the facts continued as follows:

Now this being substantially the conclusion as to the facts of the case, the question remains whether, under the circumstances, Smith is guilty of the crime of murder. It is perfectly clear in the first case that Smith shot the deceased deliberately and intentionally, and of course the ordinary rule of the law is that when one man kills another deliberately and intentionally, that killing is murder unless it can be justified by some valid legal excuse. What justification has been set up? It is, that Smith was obeying the orders of his superior officer, and the question therefore for the Court to consider is whether under all the circumstances of the case this made the killing justifiable homicide or murder. There is nothing between; it is either murder or nothing at all. It is clear that Smith did not do the killing on his own responsibility, but acted in obedience to the order received from Captain Cox, and believed that he was carrying the order out. This brings us to the next question raised: whether the order was a lawful one; whether it was a necessary and proper order under all the circumstances. It is further argued that whether or not it was a lawful order, Captain Cox and Smith are protected by the provisions of the Indemnity Act passed last session, and that in the event of it being an unlawful order Smith is protected in obeying the order he received from his superior. It is not necessary that the Court should express any decided opinion as to whether or not the order given by Captain Cox was a lawful one, or whether if it were not lawful, the captain and Smith are protected by the provisions of the Indemnity Act. It is not desirable or necessary to express an opinion on these matters, which have reference more to Captain Cox than to the prisoner. The point which the Court thinks it should decide and can decide in favour of the prisoner, is whether, assuming that the order is an unlawful one, Smith in doing this is protected because he was carrying out the orders of his superior officer, and this leads the Court to consider the important point of law as to how far a private soldier is protected in carrying out his superior's orders. Curiously enough this point has never yet been

¹ The above statement of facts has been slightly altered [Ed.].

decided in any English court of law, and we therefore have now, as far as we are able and with such authorities as we have before us, to express our opinion as to the rule which is to guide us in the present case. Two extreme propositions of law have been laid down, one by each side. On the one side it is argued that absolute, implicit, and unquestioning obedience is required from a soldier in complying with the orders of a commanding officer. That, however, is a rule of law which the Court does not think it would be justified in adopting in the present case. That proposition has been discussed by Mr. Justice STEPHEN in his *History of the Criminal Law*. A soldier is responsible by military and civil law, and it is monstrous to suppose that a soldier would be protected where the order is grossly illegal. The Court cannot therefore decide that a soldier is bound to obey any order that may be given him. Then there is the second proposition: that a soldier is only bound to obey lawful orders and is responsible if he obeys an order not strictly legal. That is an extreme proposition which the Court cannot accept for its guidance. Of course under the Army Act a soldier is only responsible for disobedience if the order given him is a lawful order, but at the same time for the protection of a private soldier it goes a good deal farther. Although he is only bound to obey lawful orders, he is protected in obeying some orders not strictly legal. If in any doubtful case a soldier were entitled to judge for himself, to consider the circumstances of the case, and to hesitate in obeying the orders given him, that would be subversive of all military discipline. One must remember that especially in time of war immediate obedience to orders is required from a private soldier, and that therefore it is not desirable that a soldier should be encouraged to question the order given him by his superiors in cases where there is some doubt as to whether the order is lawful or not. It is clear that we cannot adopt as a rule either of these two extreme propositions. After looking at authorities quoted from the bar and such other authorities as have been accessible, it seems to me that the rule laid down in the *Manual of Military Law* is a reasonable and proper rule to apply in such a case as this. This states that if the commands are obviously illegal, an inferior would be justified in questioning or even refusing to execute such commands, but as long as the orders of the superior are not obviously and decidedly in opposition to the law of the land, or to the well-known established customs of

the army, so long must they meet with complete and unhesitating obedience. There is an opinion of Mr. Justice WILLES to the effect that an officer or soldier acting under orders from his superior which are not necessarily or manifestly illegal, would be justified.¹ I think the rule a reasonable one, and one which has become a well-established principle of law. The well-known principle of criminal law demands that there must be some blameworthy condition of mind, some guilty knowledge shown to the Court to justify finding a person guilty of a crime. It would shock one's ideas of what is right and just if a man were convicted of a crime if there is not blame in some way or other. If he did a thing without knowing he was doing wrong, or had reasonable grounds for believing that certain facts existed which justified his doing a thing, he would be excused on the ground that there was no guilty knowledge on his part. I think it is a safe rule to lay down that if a soldier honestly believes he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer. The last question to consider is whether the order given by Captain Cox was so manifestly or obviously illegal that a man of Smith's intelligence must or ought to have known he was doing wrong in obeying the order. If it were not so then Smith is, in the opinion of the Court, protected in carrying out the order. In considering this question I do not think I need say much. There is a good deal to be said in favour of the view urged upon the Court by counsel for the defence that under all the circumstances of the case the order was not altogether an unreasonable or unnecessary one. This point, however, need not be decided. We are all quite satisfied that the order was not so plainly illegal that Smith would have been justified under the circumstances in refusing to obey it, and that being so, we come to the conclusion that Smith was protected in carrying out the order he received from his superior officer to shoot the deceased man if he did not get the bridle. We therefore find Smith 'not guilty' of the charge against him.

The other Members of the Court concurred.

¹ See *Keighly v. Bell*, (1866) 4 F. & F. at p. 790 [Ed.].

B.

THE MAINTENANCE OF ORDER

So much of modern government is carried on by special authorities under statutory powers that it is interesting to note that the prime function of government, the maintenance of order and execution of the law, is still largely a matter of Common Law, and to a great extent the business of the ordinary citizen.

The law on this subject is most conveniently treated with reference to the three criminal offences of riot, rout, and unlawful assembly. The cases of *Beatty v. Gillbanks*, *O'Kelly v. Harvey*, *Reg. v. Justices of Londonderry*, and *Wise v. Dunning* (pp. 354, 356, 357, 358 below), which are the main authorities on unlawful assemblies, have been made famous by Dicey's discussion of the Right of Public Meeting, and call for no further comment here. Riots and routs are well defined in the following passages from Hawkins, *Pleas of the Crown*:

'And first a Riot seems to be a tumultuous disturbance of the peace, by three persons, or more, assembling together of their own authority, with an intent mutually to assist one another, against any who shall oppose them, in the execution of some enterprize of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful' (c. 65, s. 1).

'A Rout seems to be, according to the general opinion, a disturbance of the peace by persons assembling together with an intention to do a thing, which if it be executed will make them rioters, and actually making a motion towards the execution thereof.' (Ibid. s. 8.)

The occurrence of a riot imposes onerous duties on all within vicinity, and particularly on magistrates and sheriffs. The law is settled on its present basis by the judges who tried the cases arising out of the Reform Bill riots at Bristol in 1831. Especially memorable are the charge of Tindal C.J. to the Grand Jury, and the summing-up of Littledale J. in *R. v. Pinney* (p. 363 below). It is strange that in strict law no discretion is allowed to the magistrate in the suppression of a riot; he is in the position of a ministerial officer. Littledale J.'s view of the law has, however, been adopted on more than one subsequent occasion, most con-

spicuously by Blackburn J. in the martial law case of *Reg. v. Eyre*, (1868) Finlason Sp. Rep.

The direction of measures for the suppression of disorder is now mainly in the hands of the magistrates. The execution of judgments in civil suits is still the duty of the sheriff. But he, like the magistrates, may when necessary call upon the ordinary subject for assistance. This was finally settled in the great Irish case of *Miller v. Knox*, (1888) 4 Bing. (N.C.) 574, which arose out of the Tithe War. The Irish executive had ordered the Royal Irish Constabulary not to assist in the unpopular task of executing judgments which enforced the obligation to pay tithes to the Protestant clergy of the Established Church. It was held that they were none the less liable to assist when called upon in case of necessity. For the police, although governed by special legislation and acting as a disciplined force under the orders of their superiors, are still regarded as ordinary subjects, and the sheriff is entitled to call upon them for assistance as part of the *posse comitatus*. Soldiers too are, in respect of civil disturbance, subject to exactly the same obligation as civilians, though they are of course bound to obey the orders of their superior officers.

But it must not be imagined that a person is entitled to wait for the orders of a magistrate or sheriff before he assists in preserving the peace. *Reg. v. Brown* (p. 364 below) shows that even a constable may demand assistance for that purpose, and that the ordinary citizen is under a very stringent obligation to render it.

Finally it must be observed that in recent times a solution has been found for the difficulty, exemplified in *R. v. Hampden*, of reconciling the sovereignty of Parliament with the need for swift executive action in case of emergency (Emergency Powers Act, 1920, p. 365 below).

CASES

BEATTY v. GILLBANKS, (1882) 9 Q. B. D. 308

QUEEN'S BENCH DIVISION

FIELD J.—I am of opinion that this order cannot be supported. The matter arises in this way. The appellants have, with others, formed themselves into an association for religious exercises among themselves, and for a religious revival, if I may use that word, which they desire to further among certain classes of the community. No one imputes to this association any other object, and so far from wishing to carry that out with violence, their opinions seem to be opposed to such a course, and, at all events, in the present case, they made no opposition to the authorities. That being their lawful object, they assembled as they had done before and marched in procession through the streets of Weston-super-Mare. No one can say that such an assembly is in itself an unlawful one. The appellants complain that in consequence of this assembly they have been found guilty of a crime of which there is no reasonable evidence that they have been guilty. The charge against them is, that they unlawfully and tumultuously assembled, with others, to the disturbance of the public peace and against the peace of the Queen. Before they can be convicted it must be shewn that this offence has been committed. There is no doubt that they and with them others assembled together in great numbers, but such an assembly to be unlawful must be tumultuous and against the peace. As far as these appellants are concerned there was nothing in their conduct when they were assembled together which was either tumultuous or against the peace. But it is said, that the conduct pursued by them on this occasion was such, as on several previous occasions, had produced riots and disturbance of the peace and terror to the inhabitants, and that the appellants knowing when they assembled together that such consequences would again arise are liable to this charge.

Now I entirely concede that every one must be taken to intend the natural consequences of his own acts, and it is clear to me that if this disturbance of the peace was the natural consequence of acts of the appellants they would be liable, and the justices would have been right in binding them over. But the evidence set forth

in the case does not support this contention; on the contrary, it shews that the disturbances were caused by other people antagonistic to the appellants, and that no acts of violence were committed by them.

In Hawkins' Pleas of the Crown, s. 9, it is said, 'An unlawful assembly according to the common opinion is a disturbance of the peace by persons barely assembling together with the intention to do a thing which if it were executed would make them rioters, but neither actually executing it nor making a motion toward the executing of it.' On this definition, standing alone, it is clear that the appellants were guilty of no offence, for it cannot be contended that they had any intention to commit any riotous act. The paragraph, however, continues thus, 'But this seems to be much too narrow a definition. For any meeting whatever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly, as where great numbers, complaining of a common grievance, meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no man can foresee what may be the event of such an assembly.' Examples are then given, but in each the circumstances of terror exist in the assembly itself, either in its object or mode of carrying it out, and there is the widest difference between such cases and the present. What has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition, and the question of the justices whether the facts stated in the case constituted the offence charged in the information must therefore be answered in the negative.

Cave J. concurred.

Judgment for the appellants.

Note (a). 'The question then seems to be reduced to this:—assuming the Plaintiff and others assembled with him to be doing nothing unlawful, but yet that there were reasonable grounds for the Defendant believing, as he did, that there would be a breach of the peace if they continued so assembled, and that there was no other way in which the breach of the peace could be avoided but by stopping and dispersing

the Plaintiff's meeting—was the Defendant justified in taking the necessary steps to stop and disperse it? In my opinion he was so justified, under the peculiar circumstances stated in the defence, and which for the present must be taken as admitted to be there truly stated. Under such circumstances the Defendant was not to defer action until a breach of the peace had actually been committed. His paramount duty was to *preserve the peace unbroken*, and that, by whatever means were available for the purpose. Furthermore, the duty of a Justice of the Peace being to preserve the peace unbroken he is, of course, entitled, and in part bound, to intervene the moment he has reasonable apprehensions of a breach of the peace being imminent; and, therefore, he must in such cases necessarily act on his own *reasonable* and *bona fide* belief, as to what is *likely* to occur. . . .

‘I assume here that the Plaintiff's meeting was not unlawful. But the question still remains—was not the Defendant justified in separating and dispersing it *if he had reasonable ground* for his belief that by no other possible means could he perform his duty of preserving the public peace. For the reasons already given, I think he was so justified, and therefore that the defence in question is good.’—Per Law C. in *O’Kelly v. Harvey*, (1883) 14 L. R. Ir. at pp. 109–110, 112.

Note (b). ‘I have always understood that the object of requiring sureties of the peace or for good behaviour is not to punish past crime, but to guard against future lawlessness. In most of the cases in which such sureties are required, the person ordered to give them has done nothing for which he could be made responsible in a criminal or civil Court; and I am quite prepared to hold that an unnecessary and unreasonable persistence in language or conduct calculated to provoke violence or tumult may afford good grounds for the exercise of this jurisdiction against a person who is himself free from any criminal or evil motive. But, assuming this to be the law, the jurisdiction can only be exercised when some facts are proved from which it can be reasonably inferred that there was actual danger of the peace being broken, or of a crime being committed, and that such danger was, in some intelligible way, the consequence of the conduct of the person required to give the sureties. The liberty of the subject cannot be allowed to depend upon an apprehension that has no grounds to support it, or upon the wayward passion of individuals as little capable of reasonable explanation as the fancy of the man who cannot abide the “gaping pig,” the “swollen bagpipe,” or the “harmless necessary cat.” In this case there was absolutely no evidence of hostility or opposition from the crowd, or of anything having been done that was personally offensive to any class of men. The same evidence might be given in the case of every military band that passes through our streets. . . .

'It has never been suggested that the mere fact of local, or even general opinion, being unfavourable to a particular line of conduct, is in itself a sufficient ground for requiring sureties for good behaviour from persons who adopt it.'—Per Holmes J. in *Reg. v. Justices of Londonderry*, (1891) 28 L. R. Ir. at pp. 462, 463.

✓ WISE v. DUNNING, [1902] 1 K. B. 167

KING'S BENCH DIVISION

LORD ALVERSTONE C.J. delivered judgment in favour of the respondent.

DARLING J.—I am of the same opinion. I think it necessary to summarize shortly the facts which were proved before the magistrate. To begin with, we have the appellant's own description of himself. He calls himself a 'crusader', who is going to preach a Protestant crusade. In order to do this he supplied himself with a crucifix, which he waved about, and round his neck were hung beads—obviously designed to represent the rosaries used by Roman Catholics. Got up in this way, he admittedly made use of expressions most insulting to the faith of the Roman Catholic population amongst whom he went. There had been disturbances and riots caused by this conduct of his before, and the magistrate has found that the language of the appellant was provocative, and that it was likely to occur again. Large crowds had assembled in the streets, and a serious riot was only prevented by the interference of the police. Now, what was the natural consequence of the appellant's acts? It was what has happened over and over again, what has given rise to all the cases which were cited to us, and what must be the inevitable consequence if persons, whether Protestants or Catholics, are to be allowed to outrage one another's religion as the appellant outraged the religion of the Roman Catholics of Liverpool. The kind of person which the evidence here shews the appellant to be I can best describe in the language of Butler. He is one of

'... that stubborn crew
Of errant saints, whom all men grant
To be the true Church Militant;

* * * * *

A sect, whose chief devotion lies
In odd perverse antipathies.'

Hudibras, Pt. I.

In my view, the natural consequence of those people's conduct has been to create the disturbances and riots which have so often given rise to this sort of case. Counsel for the appellant contended that the natural consequence must be taken to be the legal acts which are a consequence. I do not think so. The natural consequence of such conduct is illegality. I think that the natural consequence of this 'crusader's' eloquence has been to produce illegal acts, and that from his acts and conduct circumstances have arisen which justified the magistrate in binding him over to keep the peace and be of good behaviour. In the judgment of O'Brien C.J. in *Reg. v. Justices of Londonderry*, (1891) 28 L. R. Ir. 440, at p. 447, there is this passage: 'Now I wish to make the ground of my judgment clear, and carefully to guard against being misunderstood. I am perfectly satisfied that the magistrates did not make the order which is impugned by reason of there having been, or there being likely to be, any obstruction of the highway, and that the true view of what took place is that the defendants were bound over in respect of an apprehended breach of the peace; and, in my opinion, there was no evidence to warrant that apprehension.' It is clear that, if there had been evidence to warrant that apprehension, the Chief Justice would have held the magistrates' decision in that case to be right. It is said that *Beatty v. Gillbanks*, (1882) 9 Q. B. D. 308, is in conflict with that decision. I am not sure that it is. I am inclined to think that, having regard to the passage which my Lord read from Field J.'s judgment in *Beatty v. Gillbanks*, the whole question is one of fact and evidence. But I do not hesitate to say that, if there be a conflict between these two cases, I prefer the law as it is laid down in *Reg. v. Justices of Londonderry*. If that be a right statement of the law, as I think it is, the magistrate was perfectly justified in coming to the conclusion he did come to in this case, even without taking into consideration the question of the local Act of Parliament to which we were referred.

For these reasons I am of opinion that the magistrate's order was right.

CHANNELL J.—I am of the same opinion. I agree with the proposition for which counsel for the appellant contended—namely, that the law does not as a rule regard an illegal act as being the natural consequence of a temptation which may be held out to commit it. For instance, a person who exposes his goods outside

his shop is often said to tempt people to steal them, but it cannot be said that that is the natural consequence of what he does. Again, the House of Lords has recently held that, where a blank space is left in a cheque which enables a person to increase the amount by adding figures, it is not the natural consequence that somebody should be led to commit forgery by writing figures into the cheque. The proposition is correct and really familiar; but I think the cases with respect to apprehended breaches of the peace shew that the law does regard the infirmity of human temper to the extent of considering that a breach of the peace, although an illegal act, may be the natural consequence of insulting or abusive language or conduct. Possibly this is an exception to the rule which the appellant's counsel pointed out to us; but I think it is quite clearly made out upon the cases which have been cited to us.

I therefore think that the decision of the magistrate was right.

Judgment for the respondent.

CHARGE TO THE BRISTOL GRAND JURY, 5 C. & P. 261

(*Special Commission*, 2 January, 1832)

TINDAL C.J.—It has been well said, that the use of the law consists, first, in preserving men's persons from death and violence—next, in securing to them the free enjoyment of their property; and although every single act of violence, and each individual breach of the law, tends to counteract and destroy this its primary use and object, yet do general risings and tumultuous meetings of the people in a more especial and particular manner produce this effect, not only removing all security, both from the persons and property of men, but for the time putting down the law itself, and daring to usurp its place.

The law of England hath, accordingly, in proportion to the danger which it attaches to riotous and disorderly meetings of the people, made ample provision for preventing such offences, and for the prompt and effectual suppression of them whenever they arise; and I think it may not be unsuitable to the present occasion, if I proceed to call your attention, with some degree of detail, to the various provisions of the law for carrying that purpose into effect.

In the first place, by the common law, every private person may lawfully endeavour, of his own authority, and without any warrant or sanction of the magistrate, to suppress a riot by every means in his power. He may disperse, or assist in dispersing, those who are assembled; he may stay those who are engaged in it from executing their purpose; he may stop and prevent others whom he shall see coming up, from joining the rest; and not only has he the authority, but it is his bounden duty as a good subject of the King, to perform this to the utmost of his ability. If the riot be general and dangerous, he may arm himself against the evil-doers to keep the peace. Such was the opinion of all the Judges of England in the time of Queen Elizabeth, in a case called 'The case of arms,' (Popham's Rep. 121), although the Judges add, 'that it would be more discreet for every one in such a case to attend and be assistant to the justices, sheriffs, or other ministers of the King in doing this.' It would undoubtedly be more advisable so to do; for the presence and authority of the magistrate would restrain the proceeding to such extremities until the danger was sufficiently immediate, or until some felony was either committed or could not be prevented without recourse to arms; and at all events, the assistance given by men who act in subordination and concert with the civil magistrate, will be more effectual to attain the object proposed than any efforts, however well-intended, of separated and disunited individuals. But if the occasion demands immediate action, and no opportunity is given for procuring the advice or sanction of the magistrate, it is the duty of every subject to act for himself and upon his own responsibility in suppressing a riotous and tumultuous assembly; and he may be assured that whatever is honestly done by him in the execution of that object will be supported and justified by the common law.

And whilst I am stating the obligation imposed by the law on every subject of the realm, I wish to observe, that the law acknowledges no distinction in this respect between the soldier and the private individual. The soldier is still a citizen, lying under the same obligation and invested with the same authority to preserve the peace of the King as any other subject. If the one is bound to attend the call of the civil magistrate, so also is the other; if the one may interfere for that purpose when the occasion demands it, without the requisition of the magistrate, so may the other too; if the one may employ arms for that purpose when arms are

necessary, the soldier may do the same. Undoubtedly the same exercise of discretion which requires the private subject to act in subordination to and in aid of the magistrate, rather than upon his own authority, before recourse is had to arms, ought to operate in a still stronger degree with a military force. But, where the danger is pressing and immediate; where a felony has actually been committed, or cannot otherwise be prevented; and from the circumstances of the case no opportunity is offered of obtaining a requisition from the proper authorities; the military subjects of the King, like his civil subjects, not only may, but are bound to do their utmost, of their own authority, to prevent the perpetration of outrage, to put down riot and tumult, and to preserve the lives and property of the people.

Still further, by the common law, not only is each private subject bound to exert himself to the utmost, but every sheriff, constable, and other peace officer is called upon to do all that in them lies for the suppression of riot, and each has authority to command all other subjects of the king to assist them in that undertaking. By an early statute, which is still in force (the 18 Hen. 4, c. 7), any two justices, together with the sheriff or undersheriff of the county, shall come with the power of the county, if need be, to arrest any rioters, and shall arrest them; and they have power to record that which they see done in their presence against the law; by which record the offenders shall be convicted, and may afterwards be brought to punishment. And here, I most distinctly observe, that it is not left to the choice or will of the subject, as some have erroneously supposed, to attend or not to the call of the magistrate, as they think proper, but every man is bound, when called upon, under pain of fine and imprisonment, to yield a ready and implicit obedience to the call of the magistrate, and to do his utmost in assisting him to suppress any tumultuous assembly; for in the succeeding reign another statute was passed, which enacts 'That the king's liege people being sufficient to travel, shall be assistant to the justices, sheriffs, and other officers upon reasonable warning, to ride with them in aid to resist such riots, routs, and assemblies, on pain of imprisonment and to make fine and ransom to the king.' In the explanation of which statute, Dalton, an early writer of considerable authority, declares, 'that the justices and sheriff may command and ought to have the aid and attendance of all knights, gentlemen, yeomen, husbandmen,

labourers, tradesmen, servants and apprentices, of all other persons being above the age of fifteen years, and able to travel.' .

In later times the course has been for the magistrate, on occasions of actual riot and confusion, to call in the aid of such persons as he thought necessary, and to swear them as special constables; and in order to prevent any doubt, if doubt could exist, as to his power to command their assistance by way of precaution, the statute 1 Geo. 4, c. 37, and since that has been repealed by the still more recent act of 1 & 2 Will. 4, c. 41, the statute last referred to has invested the magistrate with that power, in direct and express terms, when tumult, riot, or felony was only likely to take place, or might reasonably be apprehended. Again, that this call of the magistrate is compulsory, and not left to the choice of the party to obey or not, appears from the express enactment of the latter act, that, if he disobeys, unless legally exempted, he is liable to the penalties and punishments therein specified.

But the most important provision of the law for the suppression of riots is to be found in the statute 1 Geo. 1, st. 2, c. 5, by which it is enacted,

'That, if any persons to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together to the disturbance of the public peace, and being required or commanded by any one or more justice or justices, or by the sheriff, &c., by proclamation to be made in the king's name, and in the form stated in the act, to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, shall, to the number of twelve or more, notwithstanding such proclamation, unlawfully, riotously, and tumultuously remain or continue together for the space of one hour after such command or request made by proclamation, then such continuing together shall be adjudged felony, and the offenders shall suffer death as felons.'¹

Such are the different provisions of the law of England for the putting down of tumultuary meetings; and it is not too much to

¹ This statute is usually known as the Riot Act, and its effect, which is often popularly misconceived, appears clearly in the following extract from the charge of Gaselee J. in *R. v. Fursey*, (1833) 6 C. & P. at p. 87. 'A riot is not the less a riot, nor an illegal meeting the less an illegal meeting, because the proclamation of the Riot Act has not been read, the effect of that proclamation being to make the parties guilty of a capital offence if they do not disperse within an hour; but, if that proclamation be not read, the common law offence remains, and it is a misdemeanor; and all magistrates, constables, and even private individuals, are justified in dispersing the offenders; and, if they cannot otherwise succeed in doing so, they may use force.'

Note that in 1833 felonies were still capital offences [Ed.].

affirm, that, if the means provided by the law are promptly and judiciously enforced by the magistrate, and honestly seconded by the co-operation of his fellow-subjects, very few and rare would be the instances in which tumultuous assemblages of the people would be able to hold defiance to the laws.

[The remainder of the charge deals with the specific points which would probably come before the notice of the Grand Jury.]

Extract from

REX v. PINNEY, (1832) 9 B. & Ad. 947

KING'S BENCH

LITLEDALE J., on Thursday, November 1st, summed up the case. He stated that there was no doubt in point of law, that a public officer guilty of a criminal neglect in the discharge of his duty was liable to an indictment or information; but he added, that the only instance he was aware of in which such an information as this had been prosecuted, was the case of Mr. Kennett, who was Lord Mayor of London during the riots in 1780, and who was tried before Lord Mansfield at Nisi Prius at Guildhall. He was charged with specific offences, (with not reading the Riot Act, and with releasing some prisoners,) as well as with general neglect of duty; whereas the present information only imputed general misconduct, and that extending over a part of three days: a more attentive consideration would therefore be requisite on the part of the jury. The learned Judge then shortly stated the history of the riot, and the substance of the information, and went on to observe that a party intrusted with the duty of putting down a riot, whether by virtue of an office of his own seeking (as in the ordinary case of a magistrate), or imposed upon him (as in that of a constable), was bound to hit the exact line between excess and failure of duty, and that the difficulty of so doing, though it might be some ground for a lenient consideration of his conduct on the part of the jury, was no legal defence to a charge like the present. Nor could a party so charged excuse himself on the mere ground of honest intention: he might omit acting to the extent of his duty from a perfectly good feeling, and that might be considered in apportioning punishment; but the question for a jury must be whether or not he had done what his duty in point of law required. The subject of inquiry therefore, in the present case would be:—'Has the defendant done all that he knew was

in his power to suppress the riots, that could reasonably be expected from a man of honesty and of ordinary prudence, firmness, and activity, under the circumstances in which he was placed? 'Honesty of intention, though not of itself sufficient to exculpate, would form an ingredient in the case, to be taken into consideration. The learned Judge then stated, as the two points upon which this enquiry would turn; whether the defendant used those means which the law requires, to assemble a sufficient force for suppressing the riot and preventing the mischief which occurred? and whether he made such use of the force which was obtained, and also of his own personal exertion, to prevent mischief, as might reasonably have been expected from a firm and honest man?

REG. v. BROWN, (1841) C. and Mar. 314

BEDFORD ASSIZES

(Crown Side)

ALDERSON B. (in summing up).—The offence imputed to the defendant consists in this—that Herbert being a constable, and there being a breach of the peace actually committing under his own view; he called upon the defendant to assist him in putting an end to it, and that he without lawful cause refused to do so. It is no unimportant matter that the Queen's subjects should assist the officers of the law, when duly required to do so, in preserving the public peace; and it is right that the state of the law should be known, and that all parties violating the duty which the law casts upon them should be fully aware of the very serious risk they ran in case of refusal. It is necessary you should be satisfied of three particulars—first, that the constable actually saw a breach of the peace committed by two or more persons. It is clear that all prize-fights are illegal, and that all persons engaging in them are punishable by law. The constable, therefore, saw parties breaking the law; and if a breach of the peace is in the act of being committed in the presence of a constable, that constable is not only justified but bound to prevent it, or put a stop to it if it has begun, and he is bound to do so without a warrant. Secondly, you must be satisfied that there was a reasonable necessity for the constable Herbert calling upon other persons for their assistance and support; and in this case there is no doubt that the constable

could not by his own unaided exertions have put an end to the combat. Lastly, the prosecutor must prove that the defendant was duly called upon to render his assistance, and that, without any physical impossibility or lawful excuse, he refused to give it. Whether the aid of the defendant, if given, would have proved sufficient or useful is not the question or the criterion. Every man might make that excuse, and say that his individual aid would have done no good; but the defendant's refusal may have been and perhaps was the cause of that of many others. Every man is bound to set a good example to others by doing his duty in preserving the public peace.

Verdict—Guilty.

EMERGENCY POWERS ACT, 1920, (10 & 11 Geo. 5, ch. 55)

An Act to make exceptional provision for the Protection of the Community in cases of Emergency.

29th October, 1920.

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1.—(1) If at any time it appears to His Majesty that any action has been taken or is immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, fuel, or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community, of the essentials of life, His Majesty may, by proclamation (hereinafter referred to as a proclamation of emergency), declare that a state of emergency exists.

No such proclamation shall be in force for more than one month, without prejudice to the issue of another proclamation at or before the end of that period.

(2) Where a proclamation of emergency has been made the occasion thereof shall forthwith be communicated to Parliament, and, if Parliament is then separated by such adjournment or prorogation as will not expire within five days, a proclamation shall be issued for the meeting of Parliament within five days, and Parliament shall accordingly meet and sit upon the day appointed

by that proclamation, and shall continue to sit and act in like manner as if it had stood adjourned or prorogued to the same day.

2.—(1) Where a proclamation of emergency has been made, and so long as the proclamation is in force, it shall be lawful for His Majesty in Council, by Order, to make regulations for securing the essentials of life to the community, and these regulations may confer or impose on a Secretary of State or other Government department, or any other persons in His Majesty's service or acting on His Majesty's behalf, such powers and duties as His Majesty may deem necessary for the preservation of the peace, for securing and regulating the supply and distribution of food, water, fuel, light, and other necessities, for maintaining the means of transit or locomotion, and for any other purposes essential to the public safety and the life of the community, and may make such provisions incidental to the powers aforesaid as may appear to His Majesty to be required for making the exercise of those powers effective:

Provided that nothing in this Act shall be construed to authorise the making of any regulations imposing any form of compulsory military service or industrial conscription:

Provided also that no such regulation shall make it an offence for any person or persons to take part in a strike, or peacefully to persuade any other person or persons to take part in a strike.

(2) Any regulations so made shall be laid before Parliament as soon as may be after they are made, and shall not continue in force after the expiration of seven days from the time when they are so laid unless a resolution is passed by both Houses providing for the continuance thereof.

(3) The regulations may provide for the trial, by courts of summary jurisdiction, of persons guilty of offences against the regulations; so, however, that the maximum penalty which may be inflicted for any offence against any such regulations shall be imprisonment with or without hard labour for a term of three months, or a fine of one hundred pounds, or both such imprisonment and fine, together with the forfeiture of any goods or money in respect of which the offence has been committed: Provided that no such regulations shall alter any existing procedure in criminal cases, or confer any right to punish by fine or imprisonment without trial.

(4) The regulations so made shall have effect as if enacted in

this Act, but may be added to, altered, or revoked by resolution of both Houses of Parliament or by regulations made in like manner and subject to the like provisions as the original regulations; and regulations made under this section shall not be deemed to be statutory rules within the meaning of section one of the Rules Publication Act, 1893.

(5) The expiry or revocation of any regulations so made shall not be deemed to have affected the previous operation thereof, or the validity of any action taken thereunder, or any penalty or punishment incurred in respect of any contravention or failure to comply therewith, or any proceeding or remedy in respect of any such punishment or penalty.

3.—(1) This Act may be cited as the Emergency Powers Act, 1920.

(2) This Act shall not apply to Ireland.

MARTIAL LAW

The term Martial Law has been used to describe a peculiar system of legal relations which arise between the military and civilian subjects of the King in time of insurrection or civil war. It has been used to cover the assumption by military commanders of powers for the restoration of order in the event of civil war or insurrection, which are not, like those described in the previous section, equally exercisable by the ordinary citizen. On this subject there is no universal consensus of opinion, and the authorities are few and inconclusive.

Such authorities as refer to the martial law exercised by the commander of an army in an enemy country are not in point, and their application to this question has only caused confusion.

The Duke of Wellington was speaking of this kind of martial law when he said in a debate in the House of Lords:

'Martial Law is neither more nor less than the will of the general who commands the army. In fact martial law means no law at all.' (1851, Hansard, vol. cxv, col. 880.)

Martial Law in this sense owes its validity to international law. It is unsafe to infer that because international law allows such a power to a military commander, municipal law will in any circumstances permit the exercise of corresponding powers by military authorities within the realm. Acts done to foreigners outside the realm may be justified as acts of State, but that defence can never avail to excuse unlawful acts done by a military officer within the realm. The cases are clearly distinguished by Mr. Cushing, Attorney-General of the United States:

'We must begin by clearly distinguishing between martial law, as a foreign or international fact, and the same thing as a domestic or municipal fact. Martial law, as exercised in any country by the commander of a foreign army, is an element of the *jus belli*. It is incidental to the state of solemn war, and appertains to the law of nations. . . . Such occupation by right of war, so long as it is military only, that is, *flagranti bello*, will be the case put by the Duke of Wellington, of all the powers of government resumed in the hands

of the Commander-in-Chief. . . . But these are examples of martial law administered by a foreign army in the enemy's country, and do not enlighten us in regard to the question of martial law in one's own country, and as administered by its military commanders. That is a case, which the law of nations does not reach.' (Opinions of Attorney-Generals, viii, at p. 369.)

Cockburn C.J., in *Reg. v. Nelson and Brand*, (1867) F. Cockburn Sp. Rep. at p. 101, repeated this warning. A reference to Lord Halsbury's use, in *Ex parte Marais* (p. 388 below), of the argument of Sir James Scarlett, will show that it has not been effectual.

There has been no attempt since the year 1628 to exercise martial law, in the sense now under discussion, in England itself. The relevant authorities relate exclusively to the exercise of martial law out of Great Britain. They may be classified as follows:

1. In two cases only have proceedings originated in an English Court. In both cases the circumstances were very peculiar and the nature of the proceedings was such as to render it very doubtful whether any binding authority can be attributed to them. These are *Reg. v. Nelson and Brand*, (1867) F. Cockburn Sp. Rep., and *Reg. v. Eyre*, (1868) Finlason Sp. Rep. In the former Cockburn C.J., in the latter Blackburn J. delivered carefully prepared charges to the Grand Jury. In both the Grand Jury threw out the bill, and in the former case it did so against the clearly expressed wish of the Chief Justice. In neither was the charge delivered after hearing the arguments of counsel, though in both there can be no doubt that all the previous authorities were present to the mind of the judge and were duly considered by him. (It should, however, be noted that the opinion of Sir John Campbell and Sir R. M. Rolfe (p. 382 below), though given as early as 1838, was not generally known until published by Forsyth in 1869.) Both prosecutions arose out of the same transactions in Jamaica, and in both much turned on legislation peculiar to that colony. It is submitted that neither charge is a binding authority where the existence of martial law in England is concerned. They fall, as persuasive authority, into line with the rest of the authorities.

The views expressed by Lord Loughborough in *Grant v. Gould* (p. 386 above) are clearly dicta and do not relate to this variety of martial law at all.

2. One case, it is conceived, is of binding authority. *Clifford and O'Sullivan* (p. 398 below) was decided by the House of Lords. It

is an Irish case, but a decision of the House of Lords in an Irish case is *in pari materia* binding no less on English than on Irish courts. How much of the judgment is *ratio decidendi* and how much *obiter dictum* is a difficult question. The so-called military court was *functus officio*, and the decision might have been rested on that ground alone.

3. Two Privy Council cases are of the greatest importance. *Ex parte Marais* (p. 888 below) and *Tilonko v. Attorney-General of Natal*, [1907] A. C. 98 (referred to in *R. v. Allen*, at p. 898 below), are no doubt not binding on an English court, but would almost certainly be followed. The latter case is invaluable as explaining the true limits of the former, particularly in that both decisions were delivered by Lord Halsbury. Both should, however, be used with some care.

4. The Irish Courts have given many decisions of high interest, two, *Wolfe Tone's Case*, (1798) 27 St. Tr. 614, and *Wright v. Fitzgerald*, (1798) 27 St. Tr. 765, dating from the 1798 rebellion, the rest from the recent troubles. So far as Ireland is concerned, they have gone far to clear up the difficulties in this most difficult branch of law. They are of course entitled to very respectful attention from English courts, not the less because some of them raise interesting questions on the effect of giving statutory powers to the military, for that is precisely the kind of question which is most likely to arise in the future. The very important conflict of authority on this particular matter between *R. v. Allen* and *Egan v. Macready* is discussed at pp. 877-81 below.

5. The South African Reports yield a few gleanings, even after *Ex parte Marais* and *Tilonko's Case* have been garnered: e. g. *In re Fourie* (1900) 17 Cape of Good Hope Supreme Court Reports, 178 and *Reg. v. Gildenhuys* (1900) 17 Cape of Good Hope Supreme Court Reports, 266. They go to strengthen what seems to be the orthodox view of modern times.

6. There is much extra-judicial authority of varying value. Reference should be made to such modern authors as Dicey (*Law of the Constitution*, ch. viii and Appendix, Note X), and Pollock, Erle Richards, and Holdsworth (all in 18 L. Q. R.); but their opinions have only persuasive authority, like that of James and Stephen, printed in Forsyth (*Cases and Opinions in Constitutional Law*, p. 551). There are, however, literary sources to which greater authority is commonly attributed. For the law previous to 1792

there is nothing else. We have to rely entirely on Sir Thomas Smith, Coke, Rolle, and Hale. Their testimony is not unambiguous, and owing to recent developments must now be received with caution.

But perhaps the clearest statement of all is contained in the opinion of Sir John Campbell A. G. and Sir R. M. Rolfe S. G. in the year 1838 (p. 382 below). To opinions of the law officers of the Crown great respect has rightly been paid, and it is probable that authority equal at least to that of a judicial dictum should be attributed to this opinion.

* * *

The history of Martial Law down to 1902 may best be studied in Professor Holdsworth's article in 18 L. Q. R., *Martial Law historically considered*. Some attempt must here be made to estimate the present law on the subject.

Whether or no at the present day such a thing as Martial Law is known to the Constitution of this country (and for both views there is much to be said), one thing is clear. Since the Petition of Right it cannot be exercised within the realm in time of peace. When violence occurs, every subject has a common law right to use force against force. The military authorities have this right no less than all other subjects of the Crown, and as war is merely organized violence, the military authorities are entitled to use any amount of force necessary for bringing the war to an end. It is clear that many acts which might be justified under Martial Law, might also be justified as instances of the use of necessary force; and quite obviously there must be some extension of the meaning of necessary force when it is applied to the conduct of a war.

It may be right to demand of a magistrate who is suppressing a riot that he shall only use that amount of force which is immediately necessary; and the victim of an assault may find that there are narrow limits to what he may legitimately do in self-defence. But an assault may be warded off by a blow, and rioters dispersed by a single volley. There is no time to obtain an injunction against an individual who is preparing to exceed in self-defence or against a magistrate who is on the point of ordering the soldiers to fire: on the other hand, these acts are simple, and the question whether they are within the limits of what is necessary is well within the powers of a common jury to determine. It is natural therefore that

there should be no case of judicial interference, but only prosecutions after the event.

In war, however, nothing will suffice but a long and well-planned campaign, and the length of the campaign and the probable occurrence in it of similar facts may enable the Courts to interfere; and indeed cases have arisen which have forced them to define their relations with the military authorities. It has been decided uniformly that where it is proved to the satisfaction of the Courts that a state of war exists they cannot interfere. At one time this rule was limited to the case where the Courts were not sitting and was justified on the ground that their jurisdiction had been already practically superseded. But during the present century this limitation has been swept away. It is still true that their jurisdiction cannot be ousted save when a state of war exists, but the existence of a state of war no longer depends on whether they are sitting or not. In *Marais's Case* the Privy Council attempted to preserve the old rule in a modified form by suggesting that the South African Courts were not sitting in their own right but by permission of the military authorities. The case of *Elphinstone v. Bedreechund*, on which the Privy Council relied, was not, however, really applicable to the circumstances before them, since it related to the exercise of Martial Law in an invaded country (see pp. 368-9 above), and the view that the Courts can be reduced to sitting by leave of the military authorities was emphatically rejected in the Irish decisions of 1921. In particular, Molony C.J. protested in *R. (Garle) v. Strickland*, [1921] 2 I. R. at p. 326, that he sat by virtue of the King's command, which no general could dispute (see also *ibid.* at p. 331). It is clear that for the Irish judges, the existence of a state of war had nothing to do with the intermission of the Courts or their alleged subordination to the military commander. It had become a mere state of fact, arising whenever it is necessary for the armed forces to resort to the uncontrolled use of exceptional measures, a view already anticipated in the dicta of Lord Halsbury in *T'lonko's Case*.

With the old limitation, the old justification must be discarded. What is to be substituted for it? Nowadays there is no doubt that the Courts are guided by the feeling that military questions are best left to soldiers and not to judges, and they are unwilling that the former should be relieved by judicial interference from any of their responsibility. Neither will they do anything which might be construed into an acknowledgement of the validity of the acts of the

military authorities. This is clearly put in the words of Buchanan, Acting C.J., in *Reg. v. Gildenhuis*, (1900) 17 Cape of Good Hope Supreme Court Reports at p. 269:

'As just stated, the military authorities instituted an inquiry into petitioner's conduct, and the petitioner recognizes these proceedings, for he now comes to Court for an order upon the military to admit him to bail. To grant such an order would be assuming a control over military operations and procedure which I do not think the Court should attempt to exercise. Any action which is taken under martial law is taken by the military on their own responsibility. In the next place, the applicant wishes to have a copy of the evidence taken at the military inquiry, but here again we cannot grant such an order without recognizing the validity of the action taken; and, as I said before, I do not think this Court should recognize acts done under martial law.'

But the Courts reserve to themselves the right to decide whether the situation calls for such an exercise of military force as to justify the appellation of a state of war. On this point Molony C.J. expressed himself in the strongest terms in *R. (Garde) v. Strickland*, [1921] 2 I. R. at p. 329:

'A somewhat startling argument was addressed to us by Mr. Serjeant Hanna, that it was not competent for this Court to decide whether a state of war existed or not, and that we were bound to accept the statement of Sir Nevil Macready in this respect as binding upon the Court. This contention is absolutely opposed to our judgment in *Allen's Case*, [1921] 2 I. R. 241, and is destitute of authority, and we desire to state, in the clearest possible language, that this Court has the power and the duty to decide whether a state of war exists which justifies the application of martial law.'

Of attempts to call the military authorities to account after the cessation of hostilities, only one case, *Wright v. Fitzgerald*, has proceeded to judgment. That case is an authority for the rule that an Act of Indemnity is no defence where the conduct sought to be justified was not *bona fide* directed to the suppression of the insurrection. The proceedings in *Reg. v. Eyre* and *Reg. v. Nelson and Brand* were abortive. If at other times the military authorities have been guilty of conduct of doubtful legality, they have been protected by Acts of Indemnity, and no one has thought fit to emulate the successful plaintiff in *Wright v. Fitzgerald*. But there is, save for some ill-advised dicta of Lord Halsbury in *Ex parte Marais* and *Tilonko's Case*, a remarkable consensus of opinion that

the military authorities, although they cannot be interfered with *durante bello*, will be liable after the restoration of peace for any excess of the powers which they have been permitted to use. (See particularly *Higgins v. Willis*, p. 404 below.)

On what principle will they be judged, or, what is more to the purpose, what justification may they allege for exceptional acts? There is some early authority, of the seventeenth century, for the existence of a prerogative to declare and enforce Martial Law, and it is a moot point whether the Petition of Right prohibited Martial Law altogether, or only in time of peace. But, whatever may have been the law in the seventeenth century, the orthodox doctrine of the present day is that martial law is no law at all and that the so-called military courts (as distinct from courts-martial established under the Army Act) are no courts at all, but mere committees of officers meeting to inform the mind and carry out the orders of the Commander-in-Chief. For this last proposition there is the best authority, the decision of the House of Lords in *Clifford and O'Sullivan* (p. 398 below). The military authorities will not therefore be justified by a plea that they were acting under a different system of law, which superseded for the time being the common law. On the other hand, the case of *Reg. v. Smith* (p. 348 above) shows that the subordinate would be protected—at least so far as criminal proceedings are concerned—in obeying the orders of the Commander-in-Chief so long as those orders were not clearly illegal. And in the present uncertainty as to the law on this subject it can hardly be said that any orders of the kind are clearly illegal. So that, as far as subordinates are concerned, it might well be said that they are acting under a law of which the Commander-in-Chief is author. But he himself of course could not justify his conduct on that ground. Is he then to be responsible for every one of his acts and every act of every one of his subordinates done in obedience to his commands? There is no really satisfactory authority on the point. On the one hand, the citizen should not be subject to acts of tyranny at the hands of one who cannot be made responsible: on the other hand, every argument against allowing the Courts to interfere with the course of military operations weighs equally heavily against submitting every one of the Commander-in-Chief's acts to be judged by a common jury. These are matters for experts. The Commander-in-Chief may reasonably say: 'You must judge my plan of campaign as a whole, and not take single

acts out of their context. You have already, by refusing to interfere with me, admitted that an occasion for exceptional measures has arisen. I have succeeded in suppressing the rebellion; can you, as laymen, say that by the exercise of this or that much less violence I could have done as well?' In fact, the argument that Lord Mansfield and Lord Loughborough used with such force in *Sutton v. Johnstone* applies equally here. But in extreme cases there must be some exceptions.

In practice the matter is always dealt with by Parliament, and as a matter at once technical and political it is probably best so arranged. Parliament, while relieving the Commander-in-Chief of the necessity of answering awkward charges, can easily provide for compensation to be given to persons who have received harsh treatment during the period of arbitrary government. And if it should turn out in any particular case that the Commander-in-Chief acted maliciously, there is the authority of *Wright v. Fitzgerald* to show that he will not escape.

This still leaves the question open, 'What would happen if Parliament failed to pass the Act of Indemnity?' Evidently the Commander-in-Chief would be liable for acts done *mala fide* and not solely with a view to suppressing the insurrection; he cannot be in any better position than he would have been had the Act of Indemnity been passed. The doctrine of immunity, elaborated by the late Sir H. Erle Richards (18 L. Q. R.), would stop short there. Surely it would leave too large a loophole for tyranny and reckless violence. On the other hand, Dicey's doctrine, that he must prove an immediate necessity for every act, is obviously too hard, and would leave too much to the feelings of a jury, ignorant of technical matters. Besides, it takes no account of the difference between a riot and a prolonged rebellion. What is required is that he should be liable either if he has acted *mala fide* or if the act in question was such that, considering his conduct as a whole, no reasonable man could deem it necessary for the suppression of the rebellion. The onus should be on the plaintiff to prove the absence of a reasonable cause and not on the defendant to prove its presence. This is practically the same doctrine as Sir F. Pollock's. As Dicey says, there is no authority for it, but his objection to it on the ground that it is incompatible with the practice of passing Acts of Indemnity fails on his own admission than an Act of Indemnity is not invariably more than a measure of prudence and grace. And it is

nothing but a development and extension of his doctrine of immediate necessity, to cover the case where the act is not isolated but part of an interconnected plan of campaign.

Have the military authorities then any rights in the event of civil war which are not equally the right of the ordinary citizen? They have the right not to be interfered with *durante bello*, and this right belongs, it is conceived, exclusively to the regularly constituted military forces. It would not avail any purely private organization established for the purpose of suppressing disorder. As O'Connor L.J. said in *Johnstone v. O'Sullivan*, [1928] 2 I. R. at p. 26,

'It is not of the essence of the principle of *Marais's Case*, [1902] A. C. 109, that the army which invokes the protection of that principle should be subject to this code or that code. It is sufficient that it should be an army properly authorized to undertake the task by those properly qualified to give such authority.'

This right arose probably as a part of the Prerogative of the Crown, but it was treated by the King's Bench Division in Ireland as an independent rule of law. On this point Molony C.J. observed in *R. (Ronayne and Mulcahy) v. Strickland*, [1921] 2 I. R. at p. 334:

'It is quite unnecessary for us to entangle ourselves in an academic inquiry as to the use of the word "prerogative." It is used sometimes in one sense, sometimes in another. The King is head of a standing army with the consent of Parliament. He cannot, it is conceded, merely by proclamation declare war inside his own dominions. It is also conceded that without such proclamation a state of things may exist when the military forces of the Crown may be employed "in executing martial law." We hold that when a state of things does exist which justifies the "execution of martial law," and such is proved to our satisfaction, our hands are tied.'

This is, indeed, one point of divergence between *R. v. Allen and Egan v. Macready*. If the right not to be interfered with is still a part of the Prerogative, probably the latter case is right. But if so, it is the only portion of the prerogative as to Martial Law which still survives, and on what ground it alone should survive it is not very easy to say.

The rule in *Reg. v. Smith* has hitherto been applied only to soldiers and sailors. Were, however, a civilian placed in an analogous position and subject to the same claims of discipline, it is probable that the plea of superior orders would avail him also. It is further

probable that a military commander would be able to excuse himself after the event under circumstances which would afford no justification to others.

Is there any need to introduce a prerogative right of exercising martial law to explain these differences? It is submitted that what has happened is that the Courts have recognized frankly that when a state of war exists—and they have not relinquished the right of adjudicating on that point—they must accept the consequences. One of these consequences is that the Executive with the aid of the military must conduct warlike operations, without liability to interference. Another consequence is that there must be unity of command, and therefore only those who act under the orders of the military are exempt from this liability; any other rule would aggravate the anarchy which it is the policy of the law to terminate. A third consequence is that there must be absolute and unhesitating obedience to all lawful orders, and therefore subordinates should not be made liable for obeying orders which are not obviously illegal. And the fourth consequence is that acts which, taken by themselves, seem unnecessary, may yet be essential ingredients in a plan of campaign which, while leading to the suppression of the insurrection, does not inflict on the subject more hardship than is under the circumstances inevitable. But this must not be taken to imply further that the success of the operations or even their unexceptionable character when considered as a whole, will render legal any and every act which the military may choose to commit.

These extensions are necessary when the common law rule that force may be met with force is applied to an insurrection which assumes the magnitude and character of a war. They can be justified without reference to any so-called prerogative to execute Martial Law. The term 'execution of Martial Law' is now nothing more than a convenient label for the state of affairs which exists when the military take exceptional measures to suppress an insurrection.

We are now in a position to consider the twin cases of *R. v. Allen* and *Egan v. Macready*. The former will be found at p. 389 below; the Court there applied the decision in *Ex parte Marais* to the peculiar state of affairs existing in Ireland in the year 1921, although special powers had been given by Parliament to the

military authorities and the Commander-in-Chief had avowedly acted outside those powers. The Court refused to go into the legality of his acts.

In *Egan v. Macready*, [1921] 1 I. R. 265, where the facts were essentially the same, O'Connor M.R. took an entirely different view of the law. His arguments deserve consideration, for *R. v. Allen* is not binding on an English Court. He refused to follow *Ex parte Marais* on the ground that it could not apply where a prisoner was not merely detained as a preventive measure, but actually sentenced to death by the military authorities. This argument hardly carries conviction; the ratio decidendi in *Marais's Case* was that the ordinary courts had no jurisdiction to interfere with the military in time of war; nothing turned on the particular sentence imposed on the prisoner. But the learned judge laid no very great stress on this point. His main argument was based on the provisions of the Restoration of Order in Ireland Act, 1920. That Act created a code which was intended to regulate—and that to the exclusion of all other rules of law—the proceedings of the military in suppressing the insurrection and restoring order. The ordinary powers of the military in suppressing insurrection were derived from the Prerogative, and the Act, covering as it did this entire department of the Prerogative, superseded it and rendered it unavailable to the military authorities (see the *De Keyser Case*, p. 325 above). Thus, the military in acting outside the powers conferred on them by the Act acted illegally. Moreover, it could not be said that the conditions in Ireland had so materially changed since the enactment of the Restoration of Order in Ireland Act that the present state of affairs had not been contemplated by Parliament when it passed the legislation in question. Even if there had been a material change in the situation, Parliament was still in session, and ought to have been applied to for any extra powers which were deemed necessary.

‘For these reasons,’ said the learned Master of the Rolls (at p. 275), ‘I am forced to the conclusion that the present case is taken out of the class which is ruled by *Marais's Case*. This is the case of a military emergency for which a special mode of action is provided by Parliament. The Act is not merely enabling, but prohibitory. The military authority, like any other department of the State, is subject to the supreme Court of the realm. To hold that, notwithstanding the Restoration of Order Act, the military authority can waive aside

Courts-martial, and sweep away the limitations as to punishment, would really involve the proposition that express legislation that the existing rebellion was not to warrant the holding of military Courts would not be binding. This would be a new development of British Constitutional Law, for which I can find no authority.' Dealing with the argument that the assumption of extra powers was necessary if the rebellion was to be suppressed, he said (at p. 277), 'The argument based on military necessity was pressed strongly, and I fully recognize that in a case not touched by special legislation it is not for the civil Court to decide whether a military act was necessary or not. That must be left for the military authority. But I think that it should at least appear that there may have been the necessity. Now, the evidence offered by the military in this case seems to me to negative the necessity for bringing the prisoner before a military Court rather than a Court-martial.' He finally came to the conclusion that, 'On the ground that the Restoration of Order Act has limited the powers of the military authority in the present state of war in Ireland, I must hold that the writ of habeas corpus must be issued' (at p. 278).

Now this argument, strong though it is, is open to criticism. It is not necessary to derive the powers of the military in time of insurrection from the Prerogative. The whole argument therefore, in so far as it is based on the doctrine in the *De Keyser Case*, is beside the mark. Then, was the Act prohibitory? It might perhaps have been so, had the military possessed, before the passing of the Act, extensive and legally recognized powers of action in case of insurrection—powers which after its passing could be exercised only to the extent and in the manner which it prescribed. But the powers of the military—if they had any—were limited to a vague right to justify exceptional acts on the ground of absolute necessity. The danger to be guarded against by the Act was not that the military would act arbitrarily, but that they would be paralysed by fear of the consequences to themselves of any extreme measures they might take to suppress the rebellion. The Restoration of Order Act told them in advance that they need not fear the consequences of anything they did which came within its terms. In these circumstances it is most unlikely that Parliament intended by passing the Act to deprive them of their previous right to justify their acts on the plea of absolute necessity. The Act no doubt narrowed the sphere within which the defence of necessity need be relied on, but it surely did not take it away entirely.

As for O'Connor M.R.'s contention—on which indeed he did

not lay much emphasis—that the action of the military in using military courts instead of courts-martial was unnecessary on the facts alleged before him, if the case had turned on that point, it might be hard to do otherwise than agree with him ; but it is in any case beside the point. Even if his view were correct, it would prove nothing except that the action of the military was illegal. It was, however, immaterial whether the action taken by the military was lawful or not, and the judges in *Allen's Case* specifically reserved judgment on that question. The difficulty was really whether the Court had jurisdiction to interfere with the military authorities. Now *Marais's Case* was perfectly general ; it never appeared there whether the detention was lawful or not. O'Connor M.R. held that the present case was taken out of the class ruled by *Marais's Case*. But this can only mean that *Marais's Case* applies only where the acts of the military authority are legal, in which case there would have been no necessity in the interests of the military authority itself for the Courts to abandon jurisdiction, and the whole *raison d'être* of the rule in *Marais's Case* would disappear.

It may, however, be possible to justify O'Connor M.R.'s decision on the following grounds :

It is admitted that a 'state of war' exists when the military find themselves compelled to act, not within their legal powers, but according to the necessities of the case ; and it may be that the Restoration of Order Act, by increasing the legal powers of the military, postponed the necessity for recourse to extra-legal measures, and so implicitly postponed the time at which the Courts were compelled to recognize the existence of a 'state of war', as described above, and to abdicate their functions. So long, therefore, as the statutory powers of the military were sufficient for the restoration of order, there could be no 'state of war', in the technical sense of the term ; and the Courts retained their jurisdiction. On this view of the law, it might be said that O'Connor M.R., holding as he did that the evidence did not disclose a state of affairs in which extra-legal measures were necessary, rightly refused to abandon his claim to control the acts of the military. The judges in *Allen's Case* took a different view of the facts and accepted Sir Nevil Macready's statement that his powers under the Restoration of Order Act were no longer sufficient, but it is not clear whether this had any influence on their judgment, or whether they would not in any event have declined jurisdiction.

If the latter inference is correct, the difference between them and O'Connor M.R. is one of law, namely, whether a 'state of war' is to be deemed to date from the time when the military are forced to adopt extraordinary measures not warranted by common law, or from the time when the exceptional powers granted to them by statute cease to be sufficient for the purpose of suppressing the insurrection; and it is more in accordance with the spirit of the Common Law and of the modern constitution to adopt the second alternative. If, however, they were influenced by Sir Nevil Macready's assertion that his powers were no longer adequate, the difference between *Allen's Case* and *Egan's Case* resolves itself into a difference of opinion as to the true interpretation to be put upon the facts. Of course if we are to adopt the reasoning of Lord Sumner in *Johnstone v. Pedlar*, [1921] 2 A. C. at p. 294, on neither view of the facts could the Courts be entitled to renounce jurisdiction. He there said:

'The Executive, which holds office and wields power, thanks to the support of Parliament, ought constitutionally to seek wider powers from Parliament, if the existing law is insufficient, nor, if so, would the enactment of wider powers be refused. If it has not taken that course, we must presume that no such necessity had arisen, but that the existing powers sufficed.'

But if the view of Lord Sumner is to be accepted, there can never be any such thing as martial law, and there can never be any room to apply the rule in *Marais's Case*. That was not the view of O'Connor M.R. He acted as he did solely because of the existence of the Restoration of Order Act, and he did not claim jurisdiction over the military authorities where there is no special legislation. In a later case, *R. (Childers) v. Adjutant-General of the Provisional Forces*, [1923] 1 I. R. 14, which arose after the conclusion of the treaty with the British Government and the establishment of the Irish Free State, he followed *Allen's Case*, and said:

'Reliance was placed on my own decision in *Egan's Case*, but that turned entirely on the effect of the Restoration of Order Act, 1920, which in my opinion controlled the action of the military authority. But that Act has no application to the circumstances of the present time.'

CASES

JOINT OPINION of the Attorney and Solicitor General, SIR JOHN CAMPBELL and SIR R. M. ROLFE, as to the power of the Governor of Canada to proclaim Martial Law.

Temple, January 16, 1838.

MY LORD,—We have to acknowledge the receipt of a letter from your Lordship of yesterday's date, together with the copy of a letter addressed by the Earl of Gosford to the Attorney and Solicitor General of Lower Canada, and their reply, on the subject of the power vested in the Governor of that province to proclaim martial law: your Lordship desires that we should take these papers into our consideration, and report to your Lordship our joint opinion whether the views expressed by the Law Officers of the Crown in Lower Canada are correct in point of law. We have now the honour of reporting to your Lordship that in our opinion the Governor of Lower Canada has the power of proclaiming, in any district in which large bodies of the inhabitants are in open rebellion, that the Executive Government will proceed to enforce martial law. We must, however, add that in our opinion such proclamation confers no power on the Governor which he would not have possessed without it. The object of it can only be to give notice to the inhabitants of the course which the Government is obliged to adopt for the purpose of restoring tranquillity. In any district in which, by reason of armed bodies of the inhabitants being engaged in insurrection, the ordinary course of law cannot be maintained, we are of opinion that the Governor may, even without any proclamation, proceed to put down the rebellion by force of arms, as in case of foreign invasion, and for that purpose may lawfully put to death all persons engaged in the work of resistance; and this, as we conceive, is all that is meant by the language of the statutes referred to in the report of the Attorney and Solicitor General for Lower Canada, when they allude to the '*undoubted prerogative of His Majesty for the public safety to resort to the exercise of martial law against open enemies or traitors*'.

The right of resorting to such an extremity is a right arising from

and limited by the necessity of the case—*quod necessitas cogit, defendit*. For this reason we are of opinion that the prerogative does not extend beyond the case of persons taken in open resistance, and with whom, by reason of the suspension of the ordinary tribunals, it is impossible to deal according to the regular course of justice. When the regular courts are open, so that criminals might be delivered over to them to be dealt with according to law, there is not, as we conceive, any right in the Crown to adopt any other course of proceeding. Such power can only be conferred by the Legislature, as was done by the Acts passed in consequence of the Irish rebellions of 1798 and 1808, and also of the Irish Coercion Act of 1888.

From the foregoing observations, your Lordship will perceive that the question, how far martial law, when in force, supersedes the ordinary tribunals, can never in our view of the case, arise. Martial law is stated by Lord Hale to be in truth no law, but something rather indulged than allowed as a law, and it can only be tolerated because, by reason of open rebellion, the enforcing of any other law has become impossible. It cannot be said in strictness to *supersede* the ordinary tribunals, inasmuch as it only exists by reason of those tribunals having been already practically superseded.

It is hardly necessary for us to add that, in our view of the case, martial law can never be enforced for the ordinary purposes of civil or even criminal justice, except, in the latter, so far as the necessity arising from actual resistance compels its adoption.

The Lord Glenelg,
&c. &c. &c.

J. CAMPBELL.
R. M. ROLFE.

✓ D. F. MARAIS v. G.O.C. LINES OF COMMUNICATION, AND ANOTHER.
Ex parte D. F. MARAIS, [1902] A. C. 109.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

This was a petition for special leave to appeal from the order of the Supreme Court set out in their Lordships' judgment.

It stated the petitioner's arrest on August 15, 1901, by the chief constable of the town of Paarl, about thirty-five miles from Cape Town, who had no warrant, and did not know the cause of arrest,

but alleged that he was acting under instructions from the military authorities; that on August 18 he and his fellow-prisoners were removed 800 miles to the town of Beaufort West, and on their arrival were detained in custody; that on September 6 he petitioned the Supreme Court in Cape Town to release him on the ground that his arrest and imprisonment were in violation of the fundamental liberties secured to the subjects of His Majesty, when it appeared from an affidavit sworn by the gaoler of Beaufort West that the petitioner was detained by an order of the military authorities dated September 8 for contravening Martial Law Regulations, par. 14, s. 2, of May 1, 1901. The regulations are set out in the reasons given by their Lordships.

Buchanan J., in refusing the application, was stated in the petition to have held that martial law had been proclaimed in the districts both of the Paarl and of Beaufort West, that the Court ought not to go into the necessity for that proclamation nor accept any responsibility for the acts of the military authorities performed in pursuance of it, though if the petitioner had not been removed from the Paarl the Court might have inquired into the necessity for martial law in that district, that the petitioner was held in custody by an officer acting under the military authorities, and that the Court could not exercise jurisdiction over the petitioner so long as martial law lasted. In his petition the petitioner contended that he had committed no crime, otherwise that he should have been arrested and tried according to law, that the civil Courts were open for his trial, that Buchanan J. himself was announced to sit for the trial of all offenders in the district of Paarl on August 27, 1901, that his arrest, deportation, and confinement in custody by the military authorities were wholly illegal, and that he was entitled to his immediate discharge.

Haldane, K.C., and *Mackarness*, for the petitioner, submitted that leave should be given, for the question of law involved was of substantial importance. The special feature of the case was that the district where the arrest was made was undisturbed, and that civil Courts were still exercising uninterrupted jurisdiction. That being so, and it appearing that the ordinary course of law could be and was being maintained, a state of war did not exist, and martial law in that case could not be applied to civilians. Even if a state of war did exist, still the application of martial law was limited by the necessity of preserving peace and order in the

district, and did not oust the jurisdiction of those civil Courts which, notwithstanding the pressure of military circumstances, were still administering the law of the land. There was no necessity alleged or shown for bringing the petitioner before a military tribunal whilst a civil Court was sitting. The right of the Crown to resort to such an extremity as the proclamation of martial law was limited by necessity, and, if a civil Court was open, the Crown had no power to try an offender by a military one. [THE LORD CHANCELLOR referred to *Sutton v. Johnston*, (1786) 1 T. R. 498; 1 R. R. 257; see p. 338 above.] That case only establishes that, on grounds of public policy, a superior officer cannot be sued by an inferior for the consequences of an act done in the course of duty or discipline, even though done maliciously. And see the dictum of Lord Mansfield C.J. to the effect that no case can occur of overpowering necessity in a well-ordered country with a regular government. Even in a remote dependency it must be extreme and imminent. A jury must decide as to its existence, which is a question of fact: see Broom's Constitutional Law, p. 734. Forsyth's Opinions, p. 198, contains a joint opinion of Sir John Campbell and Sir R. M. Rolfe as to the power of the Governor of Canada to proclaim martial law during the rebellion to the effect that the right to do so arises from and is limited by the necessity of the case. Their opinion was that, 'When the regular Courts are open so that criminals might be delivered over to them to be dealt with according to law, there is not, we conceive, any right in the Crown to adopt any other course of proceeding': and see *Ex parte Milligan*, (1866) 4 Wallace, U.S. Rep. 2, 137, where it was held by the Supreme Court of the United States that Congress could not invest military commissioners with jurisdiction to try citizens for offences in a State not invaded and not in rebellion, and in which the Federal Courts were open: 'The invasion must be real, such as effectually closes the Courts, and deposes the civil administration.' Reference was also made to the separately published report of *Reg. v. Nelson*, (1866) Cockburn's Rep. p. 69, and *Reg. v. Eyre*, (1866) Finlason's Rep. 74, and to the case of Doctor Reinecke, a gentleman who had been arrested on August 27 at Ceres in the Cape Colony by the military under circumstances similar to those of the petitioner. The Supreme Court at Cape Town had ordered the liberation of Dr. Reinecke. The case was reported in the *South African News* of September 27.

Dec. 18. The reasons for their Lordships' report that the petition should be refused were delivered by

THE LORD CHANCELLOR.—This was an appeal by D. F. Marais for special leave to appeal against a decision of the Courts in Cape Colony which had refused to release him from an arrest effected by the military forces of the Crown on August 15 last.

It appeared sufficiently from the petitioner's own petition, as well as the documents accompanying it, that the district in which he was arrested, and the district to which he was removed (and of which removal he also complained), was a district which had been proclaimed under martial law.

The petitioner applied to the Supreme Court complaining of his arrest and imprisonment, and on September 12 last the matter of the petitioner's arrest was brought before Buchanan J., and that learned judge, after hearing the matter, made the following order:—

'In the Supreme Court of the Colony of the Cape of Good Hope.

'Cape Town, Thursday, 12th September, 1901.

'In the matter of the petition of David François Marais.

'Having heard Mr. Currey, with him Mr. S. Solomon, for petitioner, Mr. Searle, K.C., for the General Officer Commanding Lines of Communication, Cape Town, and the Honourable the Attorney-General Sir James Rose Innes, K.C.M.G., with him Mr. Ward, for the Colonial Government, upon petitioner's application for his immediate liberation and discharge, and having read the order granted on the 6th instant, calling upon the gaoler at Beaufort West to return to this Court the authority on which he detains petitioner:

'Having also read the further affidavits filed, and having heard the return, made by the Attorney-General verbally, that the gaoler who has the custody of the petitioner holds him as an officer acting under the authority and control of the military authorities in the district in which martial law prevails:

'It is ordered that the said application be and the same is hereby refused.

'By order of the Court.

'J. H. GATELY,

'Acting Registrar.'

From the petitioner's affidavit it appears that the ground of his arrest was stated in an affidavit by Major-General Wynne, that in the opinion of the military authorities there were military reasons that the petitioner should be removed and kept in custody.

All the persons arrested were, as appeared by the warrant under which they were arrested, charged with contravening what were called 'Martial Law Regulations', which regulations are set out in the petitioner's affidavit as follows:—

'No. 14. Rebellion, Dealings with Enemy, &c.

'Notice is hereby given that from and after the 22nd April, 1901, all subjects of His Majesty and all persons residing in Cape Colony who shall in districts thereof in which martial law prevails:—

'(1.) Be actively in arms against His Majesty, or

'(2.) Directly incite others to take up arms against His Majesty, or

'(3.) Actively aid or assist the enemy, or

'(4.) Commit any overt act by which the safety of His Majesty's forces or subjects are endangered,

shall immediately on arrest be tried by a military Court convened by authority of the General Commanding-in-Chief of His Majesty's Forces in South Africa, and shall on conviction be liable to the severest penalties. These penalties include death, penal servitude, imprisonment and fine.

'Any person reasonably suspected of such offence is liable to be arrested without warrant, or sent out of the district, to be hereafter dealt with by a military Court.'

Under these circumstances their Lordships were appealed to to give special leave to appeal, and Mr. Haldane, on behalf of the petitioner, was fully heard on November 5 last.

The only ground susceptible of argument urged by the learned counsel was that whereas some of the courts were open it was impossible to apply the ordinary rule that where actual war is raging the civil Courts have no jurisdiction to deal with military action, but where acts of war are in question the military tribunals alone are competent to deal with such questions.

The question was as fully argued before their Lordships by the learned counsel as it could have been argued if leave to appeal had been given, and their Lordships did not think it right to suggest any doubt upon the law by giving special leave to appeal where the circumstances render the law clear. They are of opinion that where actual war is raging acts done by the military authorities are not justiciable by the ordinary tribunals, and that war in this case was actually raging, even if their Lordships did not take judicial notice of it, is sufficiently evidenced by the facts disclosed by the petitioner's own petition and affidavit.

Martial law had been proclaimed over the district in which the prisoner was arrested and the district to which he was removed. The fact that for some purposes some tribunals had been permitted to pursue their ordinary course is not conclusive that war was not raging. That question came before the Privy Council as long ago as the year 1830.

In *Elphinstone v. Bedreechund*, 1 Knapp, P. C. 316, the Supreme Court at Bombay had given a large sum as damages against the appellant for the seizure of certain treasure at Poonah. During the time of the seizure no actual hostilities were carried on in the immediate neighbourhood of Poonah, but the great battle of Kirkee had been fought, and Poonah had been taken possession of by the British forces. The treasure was seized on July 17, 1818. At Poonah some Courts had been open from the previous February, and it was argued and held by the Bombay Courts that it must be held to be a time of peace, and that the military authorities were responsible in damages for seizure of the treasure.

To this the Attorney-General, Sir James Scarlett, replied, that a military commander may allow the usual Courts of justice that existed in the country before the invasion to continue their jurisdiction upon such subjects as may not be reserved for the consideration of the commander; but this does not deprive the commander of his power, or free the country from military government.

Lord Tenterden in giving judgment said: 'We think the proper character of the transaction was that of hostile seizure made, if not flagrante, yet nondum cessante bello, regard being had both to the time, the place, and the person, and, consequently, that the municipal Court had no jurisdiction to adjudge upon the subject,' and the judgment was accordingly reversed.

The truth is that no doubt has ever existed that where war actually prevails the ordinary Courts have no jurisdiction over the action of the military authorities.

Doubtless cases of difficulty arise when the fact of a state of rebellion or insurrection is not clearly established.

It may often be a question whether a mere riot, or disturbance neither so serious nor so extensive as really to amount to a war at all, has not been treated with an excessive severity, and whether the intervention of the military force was necessary; but once let the fact of actual war be established, and there is an universal consensus of opinion that the civil Courts have no jurisdiction to

call in question the propriety of the action of military authorities.

The framers of the Petition of Right knew well what they meant when they made a condition of peace the ground of the illegality of unconstitutional procedure.¹

For these reasons their Lordships advised His Majesty to refuse leave to appeal.

Present: THE LORD CHANCELLOR (HALSBURY), LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR HENRY DE VILLIERS.

REX v. ALLEN, [1921] 2 I. R. 241

KING'S BENCH DIVISION, IRELAND

[On the 10th December, 1920, in consequence of the disorder in Ireland, culminating in the Macroom massacre, the Lord-Lieutenant proclaimed martial law in certain counties and cities of Southern Ireland. Under cover of this proclamation, on the 12th December 1920, Sir Nevil Macready, G.O.C. in Chief of the Forces in Ireland, proclaimed that any unauthorized person other than members of the armed forces found in possession of arms or ammunition, would be liable, on conviction by a military Court, to suffer death.

On the 19th January 1921 John Allen, a civilian, was arrested within the proclaimed area in possession of arms and ammunition, and on being convicted by a military Court, was sentenced to death.

On the 9th February 1921 application was made in the King's Bench Division of Ireland for writs of prohibition, habeas corpus and certiorari, on the ground that the conviction was in excess of the jurisdiction of the Court.]

MOLONY C.J. delivered the unanimous judgment of the court. [*After discussing the facts, he continued:*]

It is the sacred duty of this court to protect the lives and liberties of all His Majesty's subjects, and to see that no one suffers loss of life or liberty save under the laws of the country; but when sub-

¹ This goes too far. There is no express restriction to a time of peace in the Petition of Right, though the commissions of martial law there complained of had, it is true, been issued in time of peace, and it may be that the prohibition should be strictly interpreted so as to apply only to commissions of that type [Ed.].

jects of the King rise in armed insurrection and the conflict is still raging, it is no less our duty not to interfere with the officers of the Crown in taking such steps as they deem necessary to quell the insurrection, and to restore peace and order and the authority of the law.

In the present case the issue is clearly knit. John Allen comes to this Court for relief on the ground that he had been tried by a Court not recognized by law, and sentenced to a punishment not authorized by law. Sir Nevil Macready, on the other hand, says that by virtue of his authority as Commander-in-Chief, acting in the execution of martial law, proceedings were taken in the case of John Allen, and that the charges against him were duly and properly tried by a military Court acting under his authority, and that John Allen is now held in custody under his authority and not otherwise. He justifies his action on the ground that actual war is still raging, and that the steps taken by him are necessary for the suppression of the insurrection and for the maintenance of good order, and that consequently this Court has no jurisdiction to interfere.

We propose to deal with four questions:—

1. Was there a state of war in the area included in the Lord Lieutenant's proclamation justifying the application of martial law?

2. What are the powers of the Executive Government in dealing with an armed insurrection?

3. Could the military Court act, having regard to the fact that Courts of Justice in the area were open?

4. Could the military Court impose a sentence of death, (a) having regard to the provisions of the Restoration of Order Act, 1920, and the regulations made thereunder, and the Firearms Act, 1920, which imposed minor penalties for the same offence, (b) having regard to the fact that the accused was not caught in actual conflict or in fresh pursuit?

As regards 1, it is necessary to refer to the affidavit of Sir Nevil Macready. [*The affidavit described in some detail the nature of the present rebellion. His Lordship summarized the affidavit and continued:—*]

In view of the facts stated and relied on by Sir Nevil Macready, and which have not been contradicted by any affidavit on behalf of the prisoner, it is impossible not to come to the conclusion that

at the time of the Lord Lieutenant's proclamation a state of war actually existed and continued to exist at the time of the arrest of John Allen, and since then down to the present time.

As regards 2, we next proceed to consider the powers of Government in dealing with such an armed insurrection. Before, however, proceeding to discuss the present state of affairs; it is desirable to say something on the historical aspect of the question.

There have been many instances in our history of insurrections and rebellions, such as Wat Tyler's, in the time of Richard II; Jack Cade's, in the time of Henry VI; Perkin Warbeck's, in the time of Henry VII; the Northern rebellion, in the time of Henry VIII; Sir Thomas Wyatt's, in the time of Queen Mary; Monmouth's, in the time of James II; the invasions and insurrections of 1715 and 1745; and the Irish insurrection of 1798. All these were exhibitions of armed force publicly displayed in the field, and were followed in most cases by Indemnity Acts, many of which are enumerated by Mr. Justice Willes in *Phillips v. Eyre*, (1870) L. R. 6 Q. B. 1, 17, intended to relieve magistrates and others in respect of illegal acts done by them in the honest execution of what they believed to be their duty. Confining ourselves for the moment to Ireland, we find in the troubled years at the end of the eighteenth century three different kinds of legislation:—

(a) Habeas corpus was temporarily suspended by 37 Geo. 3, c. 1; 38 Geo. 3, c. 14 & 21. (b) Indemnity Acts were passed, such as 36 Geo. 3, c. 6; 38 Geo. 3, c. 74; and 39 Geo. 3, c. 50; but none of these Acts appears to have contemplated either Courts-martial or death sentences. (c) Acts were passed giving statutory effect to proclamations of the Lord Lieutenant, such as 37 Geo. 3, c. 38, and 39 Geo. 3, c. 11. The last-mentioned Act, to which Royal assent was given on the 25th March, 1799, is worthy of particular notice. It recites Lord Camden's proclamation of the 30th March, 1798, requiring the officers commanding His Majesty's forces to employ them with the utmost vigour and decision for the immediate suppression of the then rebellion, and a further proclamation of the 24th May, 1798, requiring general officers commanding His Majesty's Forces to punish all persons acting, aiding, or in any way assisting in the said rebellion, according to martial law, either by death or otherwise, as to them should seem expedient; and that His Excellency had by message communicated his said orders and proclamations to the Lords Spiritual and Temporal and Commons

then in Parliament assembled, who did by their addresses to His Excellency express their entire approbation of the decisive measures so taken by His Excellency, however deeply they lamented the necessity by which they were dictated; and recites further that the peace of the Kingdom had been so far restored as to permit the course of the Common Law partially to take place, but that the said rebellion still continued to rage in very considerable parts of the Kingdom. The Act then provided that the Lord Lieutenant might issue orders to officers and others during the rebellion, whether the Courts of Justice were open or not, to take the most vigorous means for suppressing the rebellion, and to punish persons assisting in the furtherance of the said rebellion, according to martial law, either by death or otherwise as to them should seem expedient. The Act further provided for the assembly of Courts-martial to try persons in a summary manner, and to be constituted of such persons as the Lord Lieutenant should direct. It further provided that acts done in pursuance of the orders of the Lord Lieutenant should not be questioned, and that officers and soldiers should be responsible to Courts-martial only for acts done under the said orders, and that if a writ of habeas corpus was obtained from the King's Bench Court, it would be sufficient return that the party was detained by a warrant of a person, whose name should have been previously notified by the Lord Lieutenant or the Chief Secretary in writing to the said Court of King's Bench. This statute was only to continue in operation until the first day of next session of Parliament and two months after. It was, however, continued in operation until the 25th of March, 1801, by the statute 40 Geo. 3, c. 2, which latter statute provided that Courts-martial constituted under the authority of the Act should consist of commissioned officers not less in number than three and not exceeding thirteen; and by 41 Geo. 3, c. 14, the minimum of three was increased to seven; and it was further provided that no sentence of death should be passed without the concurrence of two-thirds at least of the officers present.

These statutes exhibit the anxiety of the Irish Parliament to give statutory effect to the Lord Lieutenant's proclamations, and to protect officers for acts done in the enforcement of martial law, while at the same time enforcing the responsibility of the Lord Lieutenant; and it appears from the reports in the State Trials that the Lord Lieutenant in each case personally confirmed the

death sentence: see *Wolfe Tone's Case*, (1798) 27 St. Tr. 614, 623, and *William Byrne's Case*, (1799) 27 St. Tr. 1078, 1123.

Unlike the armed insurrections of the past, where the insurgents met the Crown forces in actual battle, the present insurrection consists exclusively of warfare of a guerilla character, the nature of which is explained by Sir Nevil Macready in the following words: 'The scheme of the said warfare does not entail fighting in distinctive uniforms, or in accordance with the laws of war, but under a system of guerilla attacks, in which inhabitants, apparently pursuing peaceful avocations, constantly come together and carry out guerilla operations, which often result in the death of or serious injuries to members of His Majesty's forces and police at the hands of the people who are posing as peaceful citizens.' During the continuance of such a state of affairs as is described in Sir Nevil Macready's affidavit the Government is entitled and, indeed, bound to repel force by force, and thereby to put down the insurrection and restore public order.

As was stated by Lord Halsbury in *Tilonko v. Attorney-General of Natal*, [1907] A. C. 98, 95, 'such acts of justice are justified by necessity by the fact of actual war, and that they are so justified under the circumstances is a fact that it is no longer necessary to insist upon, because it has been over and over again so decided by Courts as to whose authority there can be no doubt.' It is unnecessary for us to discuss the cases to which Lord Halsbury refers, such as the *Case of Ship Money*, (1687) 3 St. Tr. 825, Holborne's Argument, at p. 976, and per Croke J., at p. 1162; *R. v. Pinvey*, (1832) 3 St. Tr. (N.S.) at p. 2, 3 B. & Ad. 947; *R. v. Stratton and others*, (1779) 21 St. Tr. at p. 1280; *R. v. Eyre*, (1868) Finlason's Report; *R. v. Nelson and Brand*, (1867) Frederick Cockburn's Report, to which may be usefully added the reports of three Royal Commissions—'Fetherstone's Riots' (*sic*) (Parliamentary Papers, 1898, 1894, c. 7234); 'Landing of Arms at Howth' (Parliamentary Papers, 1914, c.d. 7681); and 'Re Sheehy-Skeffington' (Parliamentary Papers, 1916, c.d. 8376).

It is also clear on the authorities that when martial law is imposed, and the necessity for it exists, or, in other words, while war is still raging, this Court has no jurisdiction to question any acts done by the military authorities (*Ex parte Marais*, [1902] A. C. 109), although after the war is over persons may be made liable, civilly and criminally, for any acts which they are proved to have

done in excess of what was reasonably required by the necessities of the case: *Governor Wall's Case*, (1802) 28 St. Tr. 51; *Wright v. Fitzgerald*, (1798) 27 St. Tr. 759; *Rainsford v. Browne*, 2 N. Ir. Jur. Repts. 179; *Ex parte Milligan*, (1866) 4 Wall. U. S. 2—unless these acts have in the meantime been covered by an Act of Indemnity.

As regards 3, could the military Court act, having regard to the fact that Courts of Justice in the area were open? This point was raised in a net form in *Wolfe Tone's Case*, (1798) 27 St. Tr. 614, but in consequence of his death was never decided. Wolfe Tone was charged with high treason, in that he, being a natural-born subject of the King, had traitorously entered into the service of the French Republic, then at open war with His Majesty, and had been taken bearing arms against his King and country. He was tried by Court-martial, acting under martial law, and was convicted and sentenced to death. On the morning fixed for his execution, Mr. Curran applied to this Court for a writ of habeas corpus on the ground that he had no commission under His Majesty, and that, therefore, no Court-martial could have cognizance of any crime imputed to him while the King's Bench sat in the capacity of the great criminal Court of the land. The Court granted the writ without argument, but, in consequence of the death of the prisoner, no return was ever made to it, and the question was, therefore, never discussed or decided. The Irish Parliament, however, in the following year, in the Act of 39 Geo. 3, c. 11, to which we have previously referred, removed any doubt that might have existed on the point by specially enacting that persons might be punished according to martial law, whether the ordinary Courts of Justice should or should not at such time be open.

In 1838 the then Attorney-General and Solicitor-General, Sir John Campbell, afterwards Lord Campbell, and Sir R. M. Rolfe, afterwards Lord Cranworth, gave an opinion in reference to the state of unrest then prevailing in Canada to the effect that when the regular Courts were open so that criminals might be delivered over to them to be dealt with according to the ordinary law, there was not any right in the Crown to adopt any other course of proceedings (*Forsyth's Cases and Opinions on Constitutional Law*, p. 199). It may, however, be doubted whether they contemplated such a system of guerilla warfare as that now described.

The matter did not arise again for decision until the case of

Ex parte Marais, [1902] A. C. 109, where it was strenuously argued by Mr. Haldane that, once it appeared that the ordinary course of law could be and was being maintained, a state of war did not exist, and martial law in that case could not be applied to civilians. The Board, however, which consisted of the Lord Chancellor, Lord Halsbury, Lord Macnaghten, Lord Shand, Lord Davy (*sic*), Lord Robertson, Lord Lindley, and Sir Henry de Villiers, did not accept this view; and the Lord Chancellor, in giving judgment, laid it down in clear language that the fact that for some purposes some tribunals had been 'permitted to preserve their ordinary course was not conclusive that war was not raging.' This case has, no doubt, been criticized on the ground that some of the language employed in the judgment was too wide, but it is a clear authority for the net point it decides, and we must give effect to it.

As regards 4, could the military Courts impose a sentence of death? In considering any question arising out of the administration of martial law by military Courts, we must not lose sight of the fact that they are not, in strictness, Courts at all; but, as Mr. Justice Stephen says, 'merely committees formed for the purpose of carrying into execution the discretionary powers assumed by the Government' ('History of Criminal Law', vol. i, p. 216); and their position could not be more accurately stated than it is by Lord Halsbury in *Tilonko v. The Attorney-General of Natal*, [1907] A. C. 98-95, where he said: 'If there is war, there is the right to repel force by force; but it is found convenient and decorous, from time to time, to authorize what are called "Courts," to administer punishments, and to restrain, by acts of repression, the violence that is committed in time of war, instead of leaving such punishments and repression to the casual action of persons acting without sufficient consultation or without sufficient order or regularity in the procedure in which things alleged to have been done are proved. But to attempt to make these proceedings by so-called Courts-martial, administering summary justice under the supervision of a military commander, analogous to the regular proceedings of Courts of Justice is quite illusory.'

The proceedings of a military Court derive their sole justification and authority from the existence of actual rebellion, and the duty of doing whatever may be necessary to quell it, and to restore peace and order. In this case the affidavit sworn by Sir Nevil Macready dates the rebellion back to the 1st of July last. Mr.

Healy and Mr. Lynch, however, referred to the Restoration of Order in Ireland Act, 1920, which received the Royal assent on the 9th August, 1920, and to the Firearms Act, 1920, which received the Royal assent on the 16th August, 1920—a week later—and pointed out that by the regulations made under the former Act the severest penalty that could be imposed by a Court-martial for the keeping of firearms or ammunition was penal servitude; and, under the latter Act, a sentence of three months' imprisonment in England, or two years in Ireland—the penalty being obviously increased in Ireland in consequence of the state of the country. They consequently argued, with considerable force, that Parliament in the Restoration of Order in Ireland Act, 1920, and the Firearms Act, 1920, assumed that the penalties enacted by those Acts would be sufficient to cope with the state of disorder then existing; and which, according to the affidavit of Sir Nevil Macready, at that time, and for some time previously, had amounted to rebellion. To this it is answered that the danger grew and became more urgent, and culminated in the cruel and inhuman shooting down of the sixteen cadets near Macroom, which immediately preceded the issue of the proclamations of the 10th and 12th December, 1920; both, it is to be noted, made when Parliament was sitting. It was further argued that the infliction of a death sentence without statutory authority was abhorrent to the spirit of the constitution, and that it was obviously wrong that a special statutory Court-martial should sit, with limited capacity, to try one man for the improper possession of arms, and at the same place a military Court should sit to try another man for a similar offence, and should be capable of converting a minor offence into a capital crime, and even of depriving the accused of the legal safeguards which he would have had under the Restoration of Order in Ireland Act, sect. 2, sub-s. 1, if he had been charged before a Court-martial with a crime punishable by death. The objection, however, is one rather for the consideration of Parliament than for this court, which cannot, *durante bello*, control the military authorities, or question any sentence imposed in the exercise of martial law; and it must be borne in mind that Sir Nevil Macready, in his affidavit, made, as we must assume, under a full sense of his official responsibility, swears that he considered and considers it absolutely essential in order to put an end to the terrible murders now so frequent, and for the suppression of the

insurrection, that the unlawful carrying or possession of arms or other lethal weapons in the martial law area should be punishable by death.

It seems competent, if war exists, for the military authorities to use special military Court machinery, and to impose any sentence, even death, without being disabled, in another case, from applying procedure of a more moderate and limited character, or vice versa. When peace is restored, acts in excess of what necessity requires, as to which there are many cases, which will be found in the notes to *Mostyn v. Fabrigas*, (1774) 1 Sm. L. C. 662, may require the protection of indemnifying legislation, the principles of which are stated by Mr. Justice Willes in *Phillips v. Eyre*, (1871) L. R. 6 Q. B. 16; but, while war is raging, as Sir Nevil Macready describes, this Court has no jurisdiction to interfere. There is no doubt that during the continuance of war a rebel guilty of treason may be slain in actual conflict or in fresh pursuit. Mr. Healy admits this, but contends that when a prisoner he must be tried as a civilian. Whatever may be the legal position of prisoners when the rebellion is quelled, it is quite clear that during the continuance of hostilities, and while martial law exists, the necessities of the situation are for the decision of the military authorities, and that they may either try the prisoner by military Court at once, or they may postpone the trial to a future date, which would usually be in the interests of the prisoner.

It is also, we think, clear that once peace is restored any prisoners in custody under sentence of a military Court, as distinct from a statutory Court-martial, would have to be discharged, unless in the meantime an Act was passed, such as the Indemnity Act, 1920 (10 & 11 Geo. 5, c. 48), which, by sect. 5, validates any sentence passed, judgment given, or order made by a military Court in connexion with the late war, with, however, a provision that any petition from a person upon whom the sentence has been passed by any such military Court shall be submitted to the Judge Advocate-General for his opinion and report, in like manner, and in the like cases, as if the sentence were a sentence passed by a Court-martial under the Army Act.

Giving full weight and anxious consideration to the powerful arguments which were addressed to us by Mr. Healy and Mr. Lynch, we have come to the conclusion that in this case we have no jurisdiction to interfere with the proceedings or sentence

of the military Court, and that consequently we must refuse the application.

[The Dublin Daily Press of 1st day of March, 1921, announced the fact of the execution of the sentence of death upon Joseph Allen (who, with others, was shot on the 28th day of February, 1921).—ED.]

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CLIFFORD AND O'SULLIVAN, [1921] 2 A. C. 570

HOUSE OF LORDS

[In this case the facts were generally similar to those in *R. v. Allen* (p. 389 above).]

VISCOUNT CAVE [*after describing the facts, continued as follows* :]

Application was made on behalf of the appellants to Powell J. that a writ of prohibition might issue directed to the above-mentioned military Court and to General Macready and Major-General Strickland to prohibit them from further proceeding with the trial of the appellants, or from pronouncing or confirming any judgment upon the appellants as a result of the trial, or from carrying into execution any such judgment or otherwise interfering with the appellants, on the ground that the military Court was illegal and had no jurisdiction to proceed with the trial of the appellants or to adjudicate in any matter in relation to them. The application was heard on affidavit evidence filed on behalf of the applicants and the respondents; and the learned judge, following a decision of a Divisional Court of the King's Bench Division in Ireland in a similar case (*Rex v. Allen*, [1921] 2 I. R. 241; see also p. 389 above), held on the authority of *Ex parte Marais*, [1902] A. C. 109 (see also p. 383 above), that a state of war existed in the above-mentioned counties of Ireland, and that where a state of war exists the civil Courts have no jurisdiction to interfere with the proceedings of the military authority. He accordingly refused the application. An appeal having been brought to the Court of Appeal, that Court held that, having regard to the provision in s. 50 of the Judicature Act (Ireland) that no appeal shall lie from a judgment of the High Court 'in any criminal cause or matter,' they had no jurisdiction to entertain the appeal and they accordingly dismissed the appeal on that ground without going into the merits. Thereupon the present appeal was brought.

On the petition of appeal to this House being lodged, objection was again taken to the appeal being heard on the ground that it was an appeal in a criminal cause or matter and this question came before your Lordships for consideration as a preliminary objection to the appeal. But on the matter being opened it appeared that it would be difficult for your Lordships to deal with the objection without being fully informed on the matters in dispute; and it was arranged that the preliminary objection should stand over to be heard along with the appeal. Cases were accordingly lodged and the appeal came on for consideration and was fully argued by counsel on both sides.

It is desirable to deal first with the preliminary objection; and for myself I entertain no doubt that the Court of Appeal had and this House has jurisdiction to entertain the appeal. Sect. 47 of the English Judicature Act, which is similar to s. 50 of the Irish Act in prohibiting an appeal from any judgment of the High Court 'in any criminal cause or matter,' has been considered in a number of cases, including *Ex parte Woodhall*, (1888) 20 Q. B. D. 832, and a recent case in this House (*Provincial Cinematograph Theatres v. Newcastle-upon-Tyne Profiteering Committee*, (1921) 87 T. L. R. 799; and it has been held that the words 'judgment of the High Court in any criminal cause or matter' should be construed in a wide sense and as including any judicial decision with regard to proceedings the subject matter of which is criminal. But, however wide be the meaning to be attached to the words in question, they cannot, I think, apply to the decision of Powell J. in this case. No doubt that decision was given in a cause or matter, such matter consisting of the application to the learned judge for a writ of prohibition; but in order that a matter may be a criminal cause or matter it must, I think, fulfil two conditions which are connoted by and implied in the word 'criminal.' It must involve the consideration of some charge of crime, that is to say, of an offence against the public law (Imperial Dictionary, tit. 'Crime' and 'Criminal'); and that charge must have been preferred or be about to be preferred before some Court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence. If these conditions are fulfilled, the matter may be criminal, even though it is held that no crime has been committed, or that the tribunal has no jurisdiction to deal with it (see *Reg. v. Fletcher*, (1876) 2 Q. B. D. 43. 47, per Amphlett J.A.,

and *Rex v. Garrett*, [1917] 2 K. B. 99, 105, per Bankes L.J.), but there must be at least a charge of crime (in the wide sense of the word) and a claim to criminal jurisdiction. In *Attorney-General v. Bradlaugh*, (1885) 14 Q. B. D. 667, 693, Brett M.R. dealt with this point as follows:—

‘The Judicature Act was dealing with procedure alone, and when the Judicature Act was passed there were forms of civil proceeding such as actions at law and suits in the Court of Chancery, and there were proceedings by indictments, there were criminal informations filed by the Queen’s Coroner or by the Attorney-General, and there were criminal proceedings before magistrates. It seems to me that the Judicature Act recognised those divisions and intended that those which were clearly criminal proceedings, and were always recognised as criminal proceedings—those which I have enumerated—should not be brought before the Court of Appeal, but that all others should.’

In the present case neither of the above conditions was fulfilled. The so-called ‘military court,’ whose proceedings were in question before Powell J., was not and did not claim to be a Court or judicial tribunal in any legal sense of those terms. It was not a Court Martial, that is to say, a tribunal regularly constituted under military law, but a body of military officers entrusted by the commanding officer with the duty of inquiring into certain alleged breaches of his commands contained in the proclamation, and of advising him as to the manner in which he should deal with the offences; and its ‘sentences,’ if confirmed, will derive their force not from the decision of the military Court, but from the authority of the officer commanding His Majesty’s forces in the field. Its true position was described by Lord Halsbury in *Tilonko v. Attorney-General of Natal*, [1907] A. C. 93, 94, on the following terms: ‘The right to administer force against force in actual war does not depend upon the proclamation of martial law at all. It depends upon the question whether there is war or not. If there is war, there is the right to repel force by force, but it is found convenient and decorous, from time to time, to authorize what are called “courts” to administer punishments, and to restrain by acts of repression the violence that is committed in time of war, instead of leaving such punishment and repression to the casual action of persons acting without sufficient consultation, or without sufficient order or regularity in the procedure in which things

alleged to have been done are proved. But to attempt to make these proceedings of so-called "courts martial," administering summary justice under the supervision of a military commander, analogous to the regular proceedings of Courts of Justice is quite illusory.' And as the so-called military Court was not a Court in any legal sense, so the charges against the appellants which were brought before that body were not in any legal sense charges of crime. It is true that the unauthorized carrying of firearms and ammunition was in fact an offence against the law, both under the Firearms Act, 1920, and under the Restoration of Order in Ireland Regulations (see reg. 9 AA and the order of the competent military authority in Ireland, dated September 28, 1918, and continued in force by the Order in Council of August 18, 1920, para. 1, sub-s. 5): but the appellants were not charged with an offence against the Act or the Regulations, and the military Court could not and did not purport to deal with them under those enactments. They sat, not as a tribunal for hearing charges of crime, but as a military committee for considering a matter arising under the proclamation and advising the commanding officer thereon: and, although in the interest of the prisoners brought before them they followed the forms of law, their proceedings were in no sense criminal proceedings. I think it follows from these considerations that Powell J., in reviewing the proceedings of the so-called military Court, was not adjudicating in a criminal cause or matter and accordingly that an appeal lies from his decision.

But when the nature of the appeal is considered the question at once arises whether, on the assumption that the appellants are right in their view of the facts and of the law applicable to them, a writ of prohibition could have been granted; and as this question may be decisive as to the fate of the appeal, it is desirable to deal with it at once. The writ of prohibition has been described as 'a judicial writ, issuing out of a court of superior jurisdiction and directed to an inferior court for the purpose of preventing the inferior from usurping a jurisdiction with which it was not legally vested, or, in other words, to compel courts entrusted with judicial duties to keep within the limits of their jurisdiction' (see Short and Mellor, *Practice of the Crown Office*, 2nd ed., p. 252). This definition is supported by the statements of text-writers (Bacon's *Abr.*, 'Prohibition,' vol. vi., p. 564; Comyns' *Digest*, 'Prohibition,' vol. vii., p. 189; Hale's *History of the Common Law*, 6th ed.,

p. 45), as well as by the opinion of Willes J. in *London Corporation v. Cox*, (1867) L. R. 2 H. L. 239, 254, and by that of Lord Blackburn in *Mackonochie v. Lord Penzance*, (1881) 6 App. Cas. 424, 448, and according to this definition, the writ should only issue to a Court having some jurisdiction which it is attempting to exceed. It is true that in the report in Salkeld of the case of *Chambers v. Jennings*, (1701) 2 Salk. 553, Holt C.J. is reported to have said that 'a prohibition would lie to a pretended court;' but in a fuller report of that case (7 Mod. 125) no such statement is to be found, and the tribunal there in question (the Court of Honour) certainly had some jurisdiction, which it continued to exercise for some years after the decision in *Chambers v. Jennings* (see *Blount's Case*, (1787) 1 Atk. 295). The same may be said of the Court of the Pope's Collector referred to in the *Vicar of Saltash's Case*, 2 Rolle's Abr. 313. It is true also that in *Reg. v. Local Government Board*, (1882) 10 Q. B. D. 309, 321, Brett L.J. expressed that the Court should not be chary of granting prohibition, and that wherever the Legislature entrusts to any body of persons, other than the superior Courts, the power of imposing an obligation upon individuals, the Court ought to control those persons if they attempt to go beyond the powers given to them by Act of Parliament; but even if this view be accepted, it cannot cover the case of a body of persons to whom no such powers have been entrusted either by Parliament or by the common law. It is unnecessary to decide whether prohibition could in any case be granted against a body improperly setting itself up as a Court with legal authority to try cases and pass judgments; but, however that may be, there is no precedent for the issue of the writ against a body which has no statutory or common law authority to do either, and which claims no such authority. In the present case the body which it is sought to prohibit, though called a military Court, neither possesses nor claims any such authority. Its legal position has been sufficiently defined in the above observations with regard to the right of appeal, and it is plain that it is in law not a Court or judicial tribunal of any kind. Nor does it claim to hold any such position. In the affidavit of Mr. Skinner, the solicitor for the appellants, upon which the application for a writ of prohibition was founded, the deponent, referring to the officers before whom the appellants had been charged, says: 'The said officers did not purport to act under any commission from His Majesty to try

prisoners, or under any statutory or common law authority or as a court martial. They purported to act merely as officers carrying out instructions from Major-General Strickland, the General Officer Commanding at Cork; and this statement correctly describes the position of the officers in question as defined both by the appellants and by the respondents, and makes it plain that those officers did not purport to act as a Court in any legal sense. If so, however wide a view may be taken of the power of Courts to grant prohibition, prohibition will not lie in this case. A further difficulty is caused to the appellants by the fact that the officers constituting the so-called military Court have long since completed their investigation and reported to the commanding officer, so that nothing remains to be done by them, and a writ of prohibition directed to them would be of no avail (see *In re Poe*, (1838) 5 B. & Ad. 681, and *Chabot v. Lord Morpeth*, (1844) 15 Q. B. 446). What the appellants really desire is an order restraining General Macready and General Strickland from confirming and carrying out the sentences; and it is clear that as against these officers, who are in no sense the officers or agents of the military Court, prohibition could not be granted.

My Lords, these considerations are sufficient to show that this appeal must fail; and this being so, I do not think it either necessary or desirable to discuss the important questions of constitutional law which have been argued on the assumption that prohibition might lie. Your Lordships were informed that in other cases applications for writs of habeas corpus have been made on grounds similar to those which are put forward in this case and have been refused, and that appeals from those refusals are pending before the Court of Appeal in Ireland. If your Lordships should agree with the view that I have expressed as to the competency of an appeal in cases of this character, those appeals will shortly come before the Court of Appeal in Ireland for decision, and it is, I think, undesirable that your Lordships should prejudice those appeals by an expression of opinion which is unnecessary for the decision of the appeal now before the House. The dismissal of this appeal on the ground that prohibition does not lie will, of course, not prevent the appellants from applying for writs of habeas corpus if they should be so advised; but on the question whether such an application could properly be granted I express no opinion.

For the reasons already given I think that this appeal fails and should be dismissed, and I move your Lordships accordingly.

[LORDS DUNEDIN, ATKINSON, and SHAW OF DUNFERMLINE concurred. LORD SUMNER dissented on the question whether appeal would lie, but agreed on the main question.]

HIGGINS v. WILLIS, [1921] 2 I. R. 386

KING'S BENCH DIVISION, IRELAND

Motion that an action brought against an officer of the Crown for damage done by his order in a martial law area be stayed on the ground that the Court had no jurisdiction, *durante bello*, to entertain such an action.

MOLONY C.J., having stated the facts, proceeded:—

Yesterday, in delivering the judgment of the Court in *Rex (Ronayne and Mulcahy) v. Strickland*, [1921] 2 I. R. 333, I laid it down that we had no jurisdiction, *durante bello*, to inquire into or pass judgment on the conduct of the Commander of the Forces in repressing rebellion, and I further stated that when the war was over the acts of the military during the war, unless protected by an Act of Indemnity, could be challenged before a jury, and that in that event even the King's command would not be an answer if the jury were satisfied that the acts complained of were not justified by the circumstances then existing, and the necessities of the case.

We are quite satisfied that this action is not frivolous or vexatious within the meaning of the authorities, and that we have no power to dismiss it.

The further question arises whether it would be right to allow the case to proceed at the present moment, in the face of the judgment which we delivered yesterday that a state of war exists in the City of Cork. It is clear upon the authorities that so long as that state of war exists this action cannot be tried; while the plaintiff has a right to have his case tried so soon as a state of war no longer prevails.

In this state of facts, we think the proper order to make is to stay the action until further order, costs of both parties of the motion to be costs in the cause.

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XII

THE OVERSEAS DOMINIONS OF THE CROWN

A. Classification

THE authority of the Crown in territories overseas is exercised under conditions which from the legal point of view are too diverse to permit of ready and exact classification. A distinction presents itself at the outset between those territories which, though subject in a greater or less degree to its control, are not in the strictest sense annexed to its dominions, and the Dominions and Crown Colonies, which are integral parts of the Empire. Thus, as a Mandatory Power under the League of Nations and subject to the oversight of its Mandates Commission, the Crown has been entrusted with responsibility under varying types of Mandates for the administration of such territories as Palestine, Tanganyika, and South-West Africa, its functions being performed in some cases by the Imperial Government and in others by those of the Dominions. Elsewhere, diplomatic arrangements have enabled it to establish 'spheres of influence' or to supervise more or less closely the government of various Protected States, as for example in Zanzibar or Malaya. To an extent which likewise varies, it is empowered under the Foreign Jurisdiction Act, 1890, to provide for the administration of large and important Protectorates, particularly in Tropical Africa. The common characteristic of all these dependencies of the Crown is that they are not properly speaking British territory, that their law and institutions may remain almost wholly native, thus facilitating, where the Crown intervenes directly in their internal affairs, the conduct of experiments in what is termed 'indirect rule'; and that their inhabitants do not become in virtue of their relationship with Great Britain full subjects of the British Crown. The very wide limits of the obedience which they owe to the Crown, however, is insisted on in the extract from *R. v. Earl Crewe; Ex parte Sekgome* quoted at p. 406 below, and it has lately been held by the Supreme Court of South Africa in *R. v. Christian*, [1924] S. A. A. D. 101 that a breach of it by the inhabitant of a Mandated Territory exposes him to the penalties of treason.

No very full examination can here be made of these instances, important as they are in themselves, of the exercise of the Crown's authority over territories which legally though not for many practical purposes must be regarded as foreign soil. Its legislative powers under the Foreign Jurisdiction Act in a Mandated Territory, their relation to the terms of the Mandate, and the position of its High Commissioner with regard to the Courts have been investigated in *Jerusalem and Jaffa District Governor v. Suleiman Murra*, [1926] A. C. 321. The status of a Protectorate is described by Kennedy L.J. in *R. v. Earl Crewe; Ex parte Sekgome*, [1910] 2 K. B. at p. 619:

'The one common element in Protectorates is the prohibition of all foreign relations except those permitted by the protecting State. Within a Protectorate, the degree and the extent of the exercise by the protecting State of those sovereign powers which Sir Henry Maine has described (*International Law*, p. 58) as a bundle or collection of powers which may be separated one from another, may and in practice do vary considerably. In this Bechuanaland Protectorate every branch of such government as exists—administrative, executive, and judicial—has been created and is maintained by Great Britain. What the idea of a Protectorate excludes, and the idea of annexation on the other hand would include, is that absolute ownership which was signified by the word "dominium" in Roman Law, and which, though perhaps not quite satisfactorily, is sometimes described as territorial sovereignty. The protected country remains in regard to the protecting State a foreign country; and, this being so, the inhabitants of a Protectorate, whether native born or immigrant settlers, do not by virtue of the relationship between the protecting and the protected State become subjects of the protecting State. As Dr. Lushington said in regard to the inhabitants of the Ionian States, then under a British Protectorate, in his judgment in *The Ionian Ships*, (1855) 2 Ecc. & Adm. 212, at p. 226, "allegiance in the proper sense of the term undoubtedly they do not owe; because allegiance exists only between the Sovereign and his subjects, properly so called, which they are not." A limited obedience the dwellers within a Protectorate do owe, as a sort of equivalent for protection; and in the present case the Orders in Council relating to the Bechuanaland Protectorate and the proclamations of the High Commissioner made thereunder imply the duty of obedience on the part of Sekgome and other persons within the area of the Protectorate to a practically unlimited extent.'

Where the protecting power increases the extent of its responsi-

bility for internal administration, there is a natural, though not an inevitable tendency for protection to be transformed into actual annexation, as was the case with Kenya in 1920. The Protectorate becomes a Crown Colony, and the Prerogative, by virtue of which the annexation is made, henceforth takes the place of the Foreign Jurisdiction Act as the authority under which the Crown performs the work of government, unless some statutory arrangement otherwise is made.

Again, considerable diversity exists among those overseas possessions of the Crown which are not only governed by its authority but are actually British territory. The classic distinction, representing the Common Law doctrine of the seventeenth and eighteenth centuries, though much altered in its application and shorn of its importance by subsequent legislation, is that between settled and conquered or ceded colonies. It differentiates colonies which have been added to the Empire by the migration thither of British subjects, who have entered into occupation of lands previously uninhabited or at least not governed by any civilized power, and therefore not subject to any civilized legal system, and those which have been acquired by conquest or cession from some recognized power hitherto capable of governing and defending it. The legal situation of the inhabitants of a settled colony presents one important initial difference from that of the inhabitants of a conquered colony. The former carry with them the law of England so far as it is applicable to the conditions of the infant colony, and they continue to enjoy as part of the law of England all their public rights as subjects of the British Crown. The Prerogative of the Crown towards them is therefore limited. Their migration leaves them still in the allegiance and under the protection of the King, and deprives them of none of the legal safeguards which secure the liberties of his natural-born subjects. This conception, and the example of the institutions of the Mother Country, led the Crown, in dealing with its older settled colonies, to set up legislative assemblies analogous to the Parliament of Great Britain, having one wholly elective chamber. Such bodies legislated on all matters of domestic concern, and asserted an exclusive right, as against the Crown whether acting alone or, as in the quarrels preceding the American Revolution, even in Parliament, to impose taxation for revenue as distinct from protective purposes. On the other hand, the point of departure is entirely different where a colony begins its

constitutional history as a British dominion by conquest or cession. Its inhabitants are at the outset rightless as against the Crown. In dealing with them the Crown, though no doubt morally bound by the terms of cession, possesses the plenitude of power and may make what arrangements it pleases. It may continue to govern permanently by prerogative Orders in Council.

In practice, however, this distinction between settled and conquered colonies has tended to subsist in the domain of private rather than of public law. As regards conquered colonies the accepted rule—as laid down, for example, by Blackstone—is that the Crown may at its own will effect such changes in the law governing the inhabitants as it deems advisable. Until it does so, 'the ancient laws of the country remain, unless they are against the law of God, as in the case of infidel countries' (Blackstone, 1 Com. 100). As a general rule, the Crown has left the existing law very largely intact, so that French civil law is still applicable to Quebec and Roman-Dutch law to the Cape of Good Hope. A distinction is thus preserved between these conquered colonies where a non-English legal system still persists to a large degree, and settled colonies where the rules of English law are applied.

In respect of public rights and duties, however, the distinction has tended to disappear. On the one hand, once a legislature has been granted to a conquered colony, the power of the Crown to legislate or impose taxation by Prerogative is irrevocably taken away. Constitutionally, it is henceforth in the same position as a settled colony (*Campbell v. Hall*, p. 425 below). On the other hand, the former practice of setting up in a settled colony a legislature conforming closely to the English type has since the eighteenth century been more and more abandoned. Either because such a form of government created difficult constitutional problems which it was hoped in future to avoid, or because in some circumstances it was obviously inapplicable, Parliament has intervened to grant the Crown statutory powers of government by passing special Acts applicable to this or that newly settled colony; and in 1887 a general Act, the British Settlements Act, was passed to provide for all subsequent cases. By this Act, the Crown is empowered to legislate for British settlements either directly or by delegation to a non-elective body within the colony. Acting under these powers, the Crown would in modern times set up such a form of government as the circumstances of the young colony seem to make advisable. For

this and the further reason that certain colonies which once possessed representative institutions of the old type have come in process of time to surrender them, it is not unusual to find in the modern British Empire that settled colonies, old and new, are being governed by the Crown without the participation of any local representative assembly, or with an assembly only partly elective: while many colonies acquired by conquest—some very recently so acquired—have become, through the action of the Crown or of the Imperial Parliament, completely self-governing. In these circumstances, the old distinction between settled and conquered colonies ceases to be of significance outside the field of private law.

Yet the existence of an elective legislature, and the consequent limitation of the Prerogative which may be historically connected with it, still affords a valuable means of differentiating between the colonies from a legal point of view. The possession of such a legislature is the legal fact which underlies the progress of the Dominions to their present constitutional status, as its absence underlies the constitutional status of the Crown Colonies. Where such a body exists, the Crown has been unable legally to exercise its Prerogative in taxation and legislation. Experience has shown the unwisdom of having recourse to the Imperial Parliament either to tax the colony or to provide the Governor with a permanent revenue. As in Great Britain itself, therefore, the control of legislation and taxation by an elective assembly has come to involve the exercise of other prerogative powers by ministers who can command the confidence of that body, though it is perhaps still rather uncertain to what extent those powers have actually been committed to Governors or Governors-General to be used on the advice of ministers responsible to Dominion Parliaments. The alternative of having recourse to the Imperial Parliament for the legal powers necessary to carry on government over the heads of a reluctant local assembly has been discredited. One other course is indeed open, to induce the colony to surrender its constitution and accept in return one in which the legislature is composed wholly or mainly of nominated members, or having at least a potential nominated majority. This has happened, generally speaking, in colonies whose population is for the most part non-European, while those peopled by Europeans have retained their elective legislatures, and, in most cases, drawn from them their normal corollary of responsible government. Where constitutions have thus been remodelled, or

where, as in many Crown Colonies, no elective legislature has ever been established, the Crown, retaining control of its prerogatives and responsible politically for their use only to the Imperial Parliament, governs directly through officials acting on instructions from the Colonial Office. It should, however, be added that during recent years and in exceptional circumstances, constitutions have been framed which, while providing for elective assemblies and responsible ministers, have reserved certain topics from the range of their competence. Such a system, which occurs in varying forms in Southern Rhodesia, Malta, India, and Ceylon, is very rare, and not always easy to work.

Thus we are enabled to distinguish between colonies which possess wholly elective legislatures and which the Crown cannot govern by prerogative Orders in Council, and those which have either no legislative assemblies at all or bodies of more or less nominated membership. The distinction implies in most cases the further distinction between those which possess responsible government and those which do not. It does not, however, necessarily follow from it. Three of the Crown Colonies likewise possess wholly elective legislatures and are exempt from legislation by Orders in Council, and yet do not possess responsible government. These are the Bahamas, Barbados, and Bermuda. Endowed in the seventeenth century with representative institutions on the English model, they have remained until the present day as interesting survivals of an archaic political order which has elsewhere passed away. They have neither on the one hand had to surrender their ancient constitutions to receive others new-modelled to the greater advantage of the Crown: nor, on the other, have they been able to progress to the political situation of full Dominion status. The unstable equilibrium which they have maintained between Dominion status and the normal modern type of Crown Colony government should serve the student as a reminder that the legal basis on which Dominion status rests in the British Empire may exist without the political consequence of self-government following in all cases from it.

Responsible government, as the student who is familiar with the working of the English constitution will hardly need to be reminded, cannot be described entirely in terms of law, but is in practice regulated by customary or conventional rules, and it is not therefore surprising to find that none of the constitutions of the Empire, with

the rather doubtful exception of that of the Irish Free State, arts. 51 and 58, contains any provision for securing the responsibility of the executive to the legislature. The Australian and South African constitutions merely require ministers, if not already members of the legislature, to become so within a specified time, while the Canadian constitution is altogether silent on the whole subject. To regard responsible government as the peculiar characteristic which differentiates the status of the Dominions from that of the Crown Colonies is not very satisfactory from the strictly legal point of view, however necessary it may be in other respects, and however important it may be not to obscure essential political differences by dwelling on their lack of substantial foundation in law. Yet the problem of attaching some specific and peculiar legal attributes to the status of colonies possessing both representative and responsible government has become increasingly insistent as they have assumed fuller control over their own affairs, both internal and external. The power of the Crown to act towards them even by authority of the Imperial Parliament, though legally subject to no limitation and both asserted and accepted since the middle of the seventeenth century, has in modern times been greatly diminished in practice, and quite recently been restrictively defined by law (see *The Statute of Westminster*, pp. 416 and 471 below). The enactments of their own legislatures, for almost every purpose, can now be completed within the colony itself, and given effect to within and without its bounds, even if they are inconsistent with those of the Imperial Parliament. Thus the self-governing dominions of the Crown have acquired a distinct legal status conforming to the political characteristics by which they were already distinguishable, and fall into a category enumerated by statute.

B. The Powers of a Colonial Legislature .

This development towards complete legislative autonomy will appear very natural when it is remembered that the authority attributed to colonial legislative bodies has never been regarded in any narrow or grudging spirit either of policy or law. It is rare to find power to legislate on any specified topic denied to the legislature even of a Crown Colony, the Crown being satisfied with the control obtained by means of the nominated majority, the Governor's veto, his right, or duty, to reserve certain classes of

enactments for the signification of the royal pleasure, and the ultimate right of disallowance, exercised on the advice of the Imperial Government. It may also be added that the legislative sovereignty of the Imperial Parliament has been as seldom invoked in respect of the internal affairs of the Crown Colonies as of the Dominions. It is therefore not surprising to find that the formula enabling a colonial legislature to make laws for the 'peace, order, and good government' of the colony, whether contained in Letters Patent from the Crown or in an Act of Parliament, has generally been interpreted by the Courts to mean a grant of sovereignty, to be exercised within the limits laid down by the instrument conferring it, but otherwise unrestricted. They have discouraged all attempts to impose further limitations and to suggest that the legislatures of the colonies are anything less than sovereign within the spheres allotted to them. The view that such a legislature was merely a delegate legislating on behalf of the Imperial Parliament and therefore incapable of delegating its authority to a subordinate body, discountenanced by the Privy Council in *Reg. v. Burah*, (1878) 3 App. Cas. 889, was directly rejected by them in *Hodge v. Reg.*, (1888) 9 App. Cas. 117, where it was raised with regard to the province of Ontario. 'It was further contended,' said Sir Barnes Peacock at (p. 181),

'that the Imperial Parliament had conferred no authority on the local legislature to delegate those powers to the Licence Commissioners, or any other persons. In other words, that the power conferred by the Imperial Parliament on the local legislature should be exercised in full by that body, and by that body alone. The maxim *delegatus non potest delegare* was relied on.'

Then he continued, in words which have become famous,

'It appears to their Lordships, however, that the objection thus raised by the appellants is founded on an entire misconception of the true character and position of the provincial legislatures. They are in no sense delegates of or acting under any mandate from the Imperial Parliament. When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and ample within the limits prescribed by sect. 92 as the Imperial Parlia-

ment in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect.'

The judgment of Sir Barnes Peacock admirably expresses the point of view from which British judges, and particularly the Judicial Committee of the Privy Council, have regarded the authority of colonial legislatures. The conception of Parliamentary sovereignty has been successfully transplanted overseas, sometimes to be established even in an environment which suggested the analogy of the American constitutional system, with its theory of a limited delegation of sovereignty by the people, rather than of the uncontrolled sovereignty of the King in Parliament. Judicial control of legislation within the British Empire has been reduced to the narrowest limits.

It is, then, assumed that the formula 'peace, order, and good government' confers full powers for the purpose of internal self-government. The notion that such legislation should conform to statutes of the Imperial Parliament (other than those expressly applying to the Colony) or the rules of the Common Law, has long since been abandoned. The formula 'peace, order, and good government' is all-inclusive. This is made clear by the words of Lord Halsbury in the Canadian case of *Riel v. Reg.*, (1885) 10 App. Cas. at p. 678:

'It appears to be suggested that any provision differing from the provisions which in this country have been made for administration, peace, order, and good government cannot, as matters of law, be provisions for peace, order, and good government in the territories to which the statute relates, and further that, if a Court of law should come to the conclusion that a particular enactment was not calculated as matter of fact and policy to secure peace, order, and good government, that they would be entitled to regard any statute directed to those objects, but which a Court should think likely to fail of that effect, as *ultra vires* and beyond the competency of the Dominion Parliament to enact.

'Their Lordships are of opinion that there is not the least colour for such a contention. The words of the statute are apt to authorize the utmost discretion of enactment for the attainment of the objects pointed to.'

The suggestions that colonial statutes should conform to English common or statute law, or that they should not be contrary to what is conceived to be 'natural justice', were rejected after full discussion in the famous case of *Phillips v. Eyre* (p. 481 below), which is indeed a miniature treatise on this aspect of the constitutional law of the colonies. It is clear that so far from seeking to impose restrictions on such legislation the Courts have disregarded all limitations on its validity save two—that a colonial act is void if and in so far as it is repugnant to an Imperial act intended to apply to the colony whose assembly enacted it, and that it has no force beyond the bounds of the colony.

The first of these is contained in the Colonial Laws Validity Act, 1865, the most important sections of which are quoted in full by Dicey (L. C., pp. 101–2), and in *Phillips v. Eyre* (at p. 486 below). Dicey, although he calls the Act the 'charter of colonial legislative independence', uses it to prove the 'legislative subordination' of colonial assemblies. This latter phrase is not perhaps very happily chosen. The intention of the Act was to quiet doubts which had been suggested by a colonial court concerning the validity of colonial acts which were inconsistent with English law, and having set up its one criterion of repugnancy, the Act at once emphasizes the fact that it imposes no other. Its third section is just as important, just as categorical, as the second. The Act is not and was never intended to be a Colonial Laws Invalidity Act. In practice, the number of Imperial statutes in respect of which repugnancy might arise was not large, and has normally been added to only at the request of the colonies concerned. Such statutes have generally referred either to colonial constitutions, in which cases it has not always been made necessary to have recourse to the Imperial Parliament when amendment was desired, or to certain topics on which uniformity of law throughout the Empire was desired, such as merchant shipping.

The second limitation is that, except where otherwise provided by act of the Imperial Parliament, the authority of a colonial legislature does not extend beyond the territorial limits of the colony. This rule is usually supported by reference to the case of *Macleod v. A.-G. for New South Wales*, [1891] A. C. 455. The facts were as follows:

The appellant was, on the 18th of July, 1872, at Darling Point, in the Colony of New South Wales, married to one Mary Manson, and, in her lifetime, on the 8th of May, 1889, he was married, at St.

Louis, in the State of Missouri, in the United States of America, to Mary Elizabeth Cameron. He was afterwards indicted, tried, and convicted, in the Colony of New South Wales, for the offence of bigamy, under the 54th section of the Criminal Law Amendment Act of 1883 (46 Vict. No. 17).

That section, so far as it is material to this case, is in these words:

‘Whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years.’

The Privy Council held that the section must be interpreted to mean, ‘Whosoever, being married, marries another person during the lifetime of the former husband or wife, and who is amenable at the time of the offence committed to the jurisdiction of the colony of New South Wales, wheresoever within that colony such second marriage takes place, shall be liable to penal servitude for seven years’. It is evident that the Privy Council deliberately narrowed the scope of the enactment, in order to avoid the necessity of declaring it *ultra vires*, for the judgment continues (at p. 458):

‘The result, as it appears to their Lordships, must be that there was no jurisdiction to try the alleged offender for this offence, and that this conviction should be set aside. Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the bar, it would have been beyond the jurisdiction of the Colony to enact such a law. Their jurisdiction is confined within their own territories.’

The judgment proceeds on the reasoning that no State has jurisdiction over crimes committed outside its territorial limits, but the case there cited, *Jeffereys v. Boosey*, (1854) 4 H. L. R. 815, only decides that a statute must, in the absence of express words to the contrary, be construed so as to apply only to persons who owe allegiance to the Crown. If it be cited for any other purpose, it proves too much; if the Imperial Parliament expresses clearly and unequivocally its intention to affect other persons also, it must be obeyed to the full (see p. 7 above). Moreover, *Jeffereys v. Boosey* refers only to the effects of legislation on foreigners without the realm, and proves nothing with regard to British subjects without the realm. In *Earl Russell's Case*, [1901] A. C. 446, it was held that a peer of the realm who had, in contravention of an Imperial statute, contracted a bigamous marriage in the United States of America,

could be validly tried for his offence before the House of Lords. Surely the true reason for the rule in *Macleod's Case* is that by the terms of the Act constituting a Colonial legislature, power is regularly given only to legislate for the peace, order, and good government of the Colony. The territorial limitation is impliedly contained in the Imperial Act.

But it has never been altogether rigidly insisted on, and instances of the benevolent construction which the Courts have placed upon it may be seen by reference to *A.-G. for Canada v. Cain*, [1906] A.C. 542 and *P. & O. Co. v. Kingston*, [1908] A.C. 471.

Both restrictions on the competence of colonial legislatures are illustrated in the case of *Nadan v. R.* (p. 442 below). There it was held that s. 1025 of the Canadian Criminal Code was void and inoperative on the double ground (1) that in that it purported to exclude the right of the Crown in Council to grant special leave to appeal in criminal cases, it was an attempt to give extra-territorial force to an Act of the Dominion Parliament; (2) that it was repugnant to the Acts of 1833 and 1844 which regulated appeals to the Privy Council.

These two restrictions have now been removed, in respect of the legislation of Dominion Parliaments, by sections 2 and 3 of the Statute of Westminster (p. 472 below). It is to be observed, however, that this Statute does not abrogate the authority of the Imperial Parliament to make laws for the whole of the Empire or any part of it. The real change is that when in future it legislates for a Dominion, it shall do so at the request of that Dominion and with its consent, to be expressly stated in the Imperial Act (s. 4). The removal of the test of repugnancy and the territorial limitation, as also of the further restrictions referred to in sections 5 and 6, does not affect the Commonwealth of Australia, New Zealand, or Newfoundland until the Statute is adopted by the Parliaments of these Dominions, which has now been done in each case, and such adoption they may subsequently revoke. The Australian States are not included in the Act. It is perhaps unnecessary to add that the Statute of Westminster does not apply to any of the other overseas possessions of the Crown, and that wherever it does not apply the test of repugnancy and the territorial limitation still hold good.

C. Constitutional Amendment

The Colonial Laws Validity Act is of greatest importance in its effects on the power of amending Dominion constitutions. It has

conferred on them an actual and a potential rigidity which the constitution of the United Kingdom itself does not possess. The actual rigidity comes from the fact that most Dominion constitutions are contained in Imperial Acts, and as such cannot, in the absence of provision to the contrary, be changed by the Dominion legislatures. In fact, however, this rigidity is important only in federal Dominions, the constitutions of which partake in some degree of the nature of treaties between the constituent provinces or states, and so ought not to be easily changed. This is the case in Canada and Australia. In the former Dominion, constitutional change requires the intervention of the Imperial Parliament for all save the most insignificant purposes. In the latter, while the process of amendment, though complicated and involving a popular referendum as well as parliamentary action, can be carried through without recourse to the Imperial Parliament, the opening sections of the Commonwealth of Australia Act, which provide for an indissoluble federal union under the Crown, cannot thus be altered. In unitary Dominions a power of constitutional change, sometimes almost unlimited in scope, has often been conferred by the constitution act itself. Where this is not the case, the defect is cured by s. 5 of the Colonial Laws Validity Act, which provides that every representative legislature (i.e. one which has one of its Houses at least half-elective in composition) 'shall, in respect to the colony under its jurisdiction, have, and be deemed at all times to have had, full power to make laws respecting the constitution, powers, and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters-patent, order in council, or colonial law for the time being in force in the said colony'.

It will be noticed that the words 'colonial law for the time being in force in the said colony' are a source of potential rigidity, and enable a Dominion legislature to restrict the powers of constitutional amendment of its successors. This obvious interpretation of the Act has recently been upheld by the Privy Council in *A.-G. for New South Wales v. Trethowan*, (1932) *Times Newspaper*, 1 June. The New South Wales Parliament had in 1929 passed an Act providing that the Legislative Council (i.e. the Upper House) should not be abolished, nor, with certain exceptions, its constitution or powers altered unless the bill containing the abolition or alteration is, before being presented to the Governor for the Royal assent,

approved by a majority of the electors voting. This provision for a referendum can itself be altered only by a referendum in the same form. If it had not been so protected, it could have been got rid of by an ordinary Act of the State Parliament. In 1930, the State Government promoted two bills, the first repealing the provisions of the Act of 1929 described above, and the second abolishing the Legislative Council. After both bills had passed both Houses of the Legislature, certain members of the Legislative Council obtained from the Supreme Court of New South Wales an injunction restraining them from being presented to the Governor until they had been submitted to the electors and a majority of the electors voting had approved them. The decision was upheld by the High Court of Australia and by the Privy Council. The Constitution Statute of 1855, which was an Imperial Act, had in substance conferred on the State Parliament full powers of constitutional amendment, but it was held that the effect of s. 5 of the Colonial Laws Validity Act, passed ten years later, was to confer on any legislature for the time being the power to define the method of constitutional amendment, and thereby also to restrict the constituent powers of its successors. It need hardly be emphasized that the use of this power might lead to very strange results, un contemplated by the Imperial Parliament at the time when the Colonial Laws Validity Act was passed.

When it was proposed that the Colonial Laws Validity Act should cease to apply to Dominion Parliaments, the question naturally arose, whether, and by what means, the rigidity of Dominion constitutions should be preserved. If no special steps had been taken, each and every Parliament in the Empire would have become sovereign—a matter of small importance in unitary Dominions, but vital to federations; for the Dominion Parliament in Canada would have been enabled to legislate in matters previously reserved by the British North America Act to the Provincial Legislatures, and vice versa. The same would have been true of the Australian Commonwealth and States. Moreover, each would automatically have acquired complete power of constitutional amendment. The solution was simple, namely, to enact in the Statute of Westminster a provision that neither the Canadian nor the Australian Constitution should be capable of alteration in any other manner than before the passing of the Statute; further, that neither Dominion or Commonwealth Parliaments, nor Provincial

Legislatures, should have any powers of legislation which they did not previously possess. The State Parliaments not being included in the Statute, there was no need to protect the Commonwealth Parliament from encroachments by them. Thus the federal constitutions are unaffected by the Statute of Westminster.

The same care has been taken to guard the constitution of the unitary Dominion of New Zealand from any change which could not have been made apart from the Statute; but as there was some doubt whether the power of constitutional amendment was not already complete, the only effect has been to perpetuate that doubt. On the other hand, it would not have been in keeping with the general policy of the Irish Free State and the Union of South Africa to allow the rigidity of their constitutions to depend, even indirectly, on an Imperial Act, and accordingly, so far as English municipal law is concerned, they have become entirely flexible. It is evident that in the view of the Government of the United Kingdom the treaty which governs the constitution of the Irish Free State no longer operates to prevent the legislature from altering the constitution by the ordinary processes of legislation, but is of a quasi-international character. The legislature therefore can alter the constitution in such a way as to be contrary to the provisions of the treaty, but such an alteration would be a breach of the treaty. Although the Union of South Africa did not procure the insertion in the Statute of Westminster of any provision maintaining such rigidity as the Union constitution possessed, it was not the intention of the Union Parliament that it should become flexible in all respects. Unanimous resolutions were therefore passed in both Houses to the effect that the Constitution should not be altered otherwise than before the Statute. The effect of these unilateral resolutions is presumably to endow the Union Constitution with conventional rigidity. Without the support of the Colonial Laws Validity Act, such a self-denying ordinance can scarcely have the force of law.

However this may be, there can be no doubt that the effect of the Statute of Westminster is to emphasize the independent nature of the Dominion constitutions, and to withdraw attention from their origin in Imperial Acts. In the Dominions, as elsewhere, popular sovereignty and public opinion are the true sanctions. One might in consequence be inclined to regard the period during which they were safeguarded by the Colonial Laws Validity Act as an

episode now devoid of significance. This would be unfortunate, for the Privy Council during that period initiated, in strict accordance with the words of the Act, a method of interpreting Dominion constitutions which is likely to continue even though their superior validity ceases to rest upon the paramount sovereignty of the Imperial Parliament. That method of interpretation is best exemplified in the words of Lord Halsbury in *Webb v. Outrim*, [1907] A. C. at p. 88,

‘Every Act of the Victorian Council and Assembly requires the assent of the Crown, but when it is assented to, it becomes an Act of Parliament as much as any Imperial Act, though the elements by which it is authorized are different. If, indeed, it were repugnant to the provisions of any Act of Parliament extending to the Colony, it might be inoperative to the extent of its repugnancy (see the Colonial Laws Validity Act, 1865), but, with this exception, no authority exists by which its validity can be questioned or impeached.’

Thus everywhere the proper way to test the validity of a legislative enactment has always been to inquire, not whether it conforms to a supposed constitution or fundamental law, but whether or no it is repugnant to the provisions of an Imperial Statute, or of a Dominion Act prescribing a particular mode of constitutional change.

The federations which exist within the Empire afford the most impressive proof that the doctrine of Parliamentary Sovereignty has been found capable of application throughout the British dominions. The expectation that American traditions of the working of federal government would in such cases be followed, either because of similarity of institutions or of geographical propinquity, or for both reasons, has not been wholly fulfilled. Since a federal constitution embodies in effect an agreement between contracting parties, which may be altered only in a specified manner, there must be some authority charged with the duty of maintaining its integrity. It was natural that, as in the United States, the Courts should have been entrusted with this duty. But their standpoint is different. Whereas American judges when they refuse to apply an enactment, do so on the ground that the legislature has exceeded the powers entrusted to it by the people, British judges apply only the test of repugnancy.

This difference might appear to be only a matter of form; it corresponds, however, to a difference of substance. It is consonant

to the genius of the American Constitution that rights should be reserved to the individual, and that they should be guaranteed against the encroachments of any and every legislature. Such a guarantee is incompatible with the practice of Parliamentary Sovereignty, as it exists anywhere in the British Empire. There seems to be some attempt to introduce guaranteed rights into the constitution of the Irish Free State, but it is problematical how far they will survive in practice. In the second place, the irresistible tendency to confer on the legislatures, at least of the self-governing Dominions, full power to legislate for the peace, order, and good government of the Dominion, has not stopped at those Dominions which have a unitary form of government. In federations it is necessary to make an accurate demarcation between the powers of the central and those of the Provincial or State legislatures, but here also it is assumed that between them they comprise all the powers necessary for the most complete internal self-government. The residue of power is always in the hands of some legislative body, and the only way of impugning its authority is to show that the power in question resides with some other legislature within the federation. This is brought out most clearly in *A.-G. for Ontario v. A.-G. for Canada* (p. 449 below). It is not necessary that the residuary power should be in the central government, nor yet in the local legislature, so long as it is in the one or the other.¹

D. The Crown and its Representatives Overseas

The King is one throughout the Empire: there is not one king of the United Kingdom, and another king of Canada, and another of Australia, nor is there one king of the Commonwealth of Australia, and another king of the State of New South Wales. This is the true importance of the decision in *Williams v. Howarth*, [1905] A. C. 551. The plaintiff in that case enlisted in a New South Wales contingent for service in South Africa. The New South Wales Government agreed to pay him at the rate of 10s., a day. During the period of his service he was paid only 5s. 6d. a day by the New South Wales Government, the balance of 4s. 6d. being

¹ On the whole subject dealt with in this section, see the article of Professor H. A. Smith, in the *Yale Law Journal* for January 1925, entitled 'Judicial Control of Legislation in the British Empire', to which the writers of this introduction are under a special debt.

paid by the Imperial Government. He now claimed from the colonial Government the balance (4s. 6d. a day) of what they had contracted to pay him. The Supreme Court of New South Wales gave judgment for the plaintiff on the ground that there was no evidence that the Imperial Government purported to pay the 4s. 6d. a day on behalf of the Colonial Government. On appeal to the Privy Council, counsel for the Colonial Government contended that 'the respondent was on the contract declared upon in the service of the Crown, and that he was to be paid by the Crown. Whether he was paid out of the funds granted to the Crown by the Imperial Parliament or out of the funds granted by the Colonial Parliament was immaterial, so long as the respondent received his pay at the contract rate. He had received 4s. 6d. a day as Imperial pay and 5s. 6d. as Colonial pay. The claim against the Crown was for 10s. a day, and had been satisfied in full. There was no contract that he should receive anything more. No question arose as to whether the two Governments were the agents of each other. Both were agents of the Crown, and the Crown had satisfied its obligation through one or other of them.' The Privy Council accepted this reasoning and granted the appeal.

(Thus the Crown is the motive force of every government within the Empire. This doctrine applies as well to the State or Provincial Governments within a federation as to the federal Government itself. Accordingly every government in British North America is a government of His Majesty, and in respect of each government His Majesty possesses prerogatives as extensive as in Great Britain, save where they have been abridged by a valid local statute (*The Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick*, p. 458 below). *A fortiori*, the same is true of Australia, since the Australian States, unlike the Provinces of Canada, retained their original constitutions after federation.

(Although it is part of the King's prerogative in the colonies no less than in the Mother Country that he cannot, in the absence of express statutory provision to the contrary,¹ be sued in his own court, yet that immunity does not extend to the person of the governor. A series of decisions, ending in *Musgrave v. Pulido* (p. 462 below), has rendered this clear beyond dispute. That case is also an authority for the following propositions: (1) The Governor of a colony is not a general representative of the Sovereign, but has

¹ e.g. The Australian Judiciary Act, 1903.

powers delegated to him by the terms of his commission, and may act lawfully only within the limits of that commission; (2) it follows from this that the mere allegation that what he did was an act of State will not save him from liability, unless he can prove that what he did was justified by the terms of his commission; of course, if the commission purports to give him authority to do what is beyond the powers of the Crown in the particular colony, it will *pro tanto* afford no justification.

In the Dominions, where executive authority is exercised by responsible ministers, it would seem, on principle, that the Governor-General ought not to be liable to be sued in the Courts in respect at least of his official acts. He is quite clearly in a different position from the Governor of a Crown Colony, who is personally responsible for his official acts, and to whom the principles laid down in *Musgrave v. Pulido* would apply. It should, however, be noted that there is no authority on the point. In the three cases of *Tandy v. Earl of Westmoreland*, (1800) 27 St. Tr. 1246, *Luby v. Lord Wodehouse*, (1865) 17 Ir. C. L. R. 618, and *Sullivan v. Earl Spencer*, (1872) Ir. R. 6 C. L. 173, it was held that no action would lie against the Lord Lieutenant of Ireland in respect of an official act, though there is a suggestion in *Luby v. Lord Wodehouse* that his immunity would not necessarily extend to his personal acts, to which the principle of *Hill v. Bigge* (p. 463 below) might apply. But it cannot be assumed that there is complete legal identity between this office and that of a Dominion Governor-General. The latter is not a Viceroy, but receives powers which are, though 'ample and adequate' for the government of the Dominion, nevertheless 'definite, enumerated, and defined' (Professor Kennedy in *L. Q. R.* April 1932). It is possible that, using their powers under the Statute of Westminster, Dominion Parliaments may repeal Imperial statutes which appear to attach legal liability to him, and make him entirely immune from process. If this is done, it will complete a development which has been set in rapid motion by recent Imperial Conferences. Since 1926, the appointment of a Governor-General has become a matter on which the King may be advised by Dominion ministers. The Governor-General's use of his discretion with regard to reservation should be exercised on their advice. And it has been recommended that, at the request of a Dominion, he should no longer act as the channel of communication between the Imperial Government and its own. Thus the office of

Governor-General seems to be in process of transformation into a purely titular dignity, and its holder is coming to be regarded solely as the personal representative of the King. Its transformation into that of Viceroy seems likely to occur at no very distant date.

(While the Crown is one throughout the Empire, there are many executives, to each of which is committed the government of some one portion of the Empire. None of these may trespass beyond the bounds of its province, and each must act in accordance with the law of the particular portion it is administering. Thus, though there is one Crown, and one ultimate sovereign, the Imperial Parliament, the executives of the Empire are mutually exclusive. As O'Connor J. said in *State of South Australia v. State of Victoria*, (1911) 12 Commonwealth Law Reports, at p. 711,

'Within the limits of self-government conferred by its Constitution the executive power of each Colony, though subject to control by Imperial enactment, is as independent of the executive power of the Empire as it is of the executive power of any Colony of the Empire. . . . I entertain no doubt that, if the British Government, by one of His Majesty's Ministers, were to enter into possession of a portion of the South Australian public lands, contrary to South Australian laws, His Majesty's Minister would be liable to be dispossessed by writ of intrusion at the suit of the State of South Australia, just as any other intruder would be liable.'

CASES

✓ **CAMPBELL v. HALL, (1774) 1 Cowp. 204**

KING'S BENCH

[The plaintiff James Campbell, a natural-born British subject who on March 3rd, 1768, had purchased a plantation on the island of Grenada, brought this action for money had and received against the defendant William Hall, a collector of revenue for His Majesty in that island, in order to recover back a sum of money paid as a duty of $4\frac{1}{2}$ per cent. on sugars exported from Grenada by the plaintiff, on the ground that the money was paid to the defendant without any consideration; the duty in respect of which he received it not having been imposed by lawful or sufficient authority. With the consent of His Majesty's Attorney-General the money still remained in the defendant's hands, not paid over by him to the use of the King, for the express purpose of trying the question as to the validity of imposing this duty.

At the trial at Guildhall, a special verdict was found, which stated that the island of Grenada was taken by the British arms, in open war, from the French King, and that it surrendered upon capitulation. The special verdict then set out the following instruments.

1. Certain articles of the capitulation: the 5th, by which it is agreed that Grenada should continue to be governed by its present laws until His Majesty's further pleasure be known; the 6th, which replies to a demand of the inhabitants of Grenada that they shall be maintained in the enjoyment of their properties and privileges by stating that, being subjects of Great Britain, they will enjoy their properties and privileges in like manner as the other His Majesty's subjects in the other British Leeward Islands; and the 7th, which replies in like terms to their demand that they shall pay no other duties or charges than what they before paid to the French King.

2. The Treaty of peace signed February 10th, 1763, including that part of the treaty by which the island of Grenada is ceded.

3. A proclamation under the Great Seal, dated October 7th, 1763, stating (*inter alia*) that 'Whereas it will greatly contribute

to the speedy settling our said governments, of which the island of Grenada is one, that our loving subjects should be informed of our paternal care for the security of the liberties and properties of those who are or shall become inhabitants of the same,' His Majesty has empowered and directed the government of Grenada by the letters patent under the Great Seal by which his government is constituted to summon general assemblies of the representatives of the people of Grenada so soon as the circumstances of the colony allow, and with their consent to make laws for the public peace, welfare, and good government of the colony and its inhabitants.

4. A proclamation dated March 26th, 1764, in which the King recites a survey of the ceded islands and their division into allotments, as an invitation to purchasers to come in and take up properties on terms specified in the proclamation.

5. Letters patent under the Great Seal, dated April 9th, 1764, commissioning General Melville as governor of Grenada, with power to set up a legislature as specified in the proclamation of October 7th, 1763.

(The governor arrived in Grenada on December 14th, 1764, and before the end of 1765 an assembly actually met in Grenada.)

6. Letters patent under the Great Seal, dated July 20th, 1764, wherein the King imposes in virtue of the Royal prerogative a duty of $4\frac{1}{2}$ per cent. on all sugars &c. exported from and after September 19th, 1764 from Grenada, as already paid in the other British Leeward Islands; this duty to take the place of all customs duties hitherto levied in Grenada by authority of His Most Christian Majesty.

7. Acts of Assemblies in the other British Leeward Islands relative to the duty of $4\frac{1}{2}$ per cent. on exported sugars &c. as paid in those islands.]

LORD MANSFIELD C.J. [*after stating the facts continued:*] The general question that arises out of all these facts found by the special verdict, is this; whether the letters patent under the Great Seal, bearing date the 20th July, 1764, are good and valid to abolish the French duties; and in lieu thereof to impose the four and half per cent. duty above mentioned, which is paid in all the British Leeward Islands?

It has been contended at the Bar, that the letters patent are void on two points; the first is, that although they had been made before the proclamation of the 7th October, 1763, yet the

King could not exercise such a legislative power over a conquered country.

The second point is, that though the King had sufficient power and authority before the 7th October, 1763, to do such legislative act, yet before the letters patent of the 20th July, 1764, he had divested himself of that authority.

A great deal has been said, and many authorities cited relative to propositions, in which both sides seem to be perfectly agreed; and which, indeed are too clear to be controverted. The stating some of those propositions which we think quite clear, will lead us to see with greater perspicuity, what is the question upon the first point, and upon what hinge it turns. I will state the propositions at large, and the first is this:

A country conquered by the British arms becomes a dominion of the King in the right of his Crown; and, therefore, necessarily subject to the Legislature, the Parliament of Great Britain.

The 2d is, that the conquered inhabitants once received under the King's protection, become subjects, and are to be universally considered in that light, not as enemies or aliens.

The 3d, that the articles of capitulation upon which the country is surrendered, and the articles of peace by which it is ceded, are sacred and inviolable according to their true intent and meaning.

The 4th, that the law and legislative government of every dominion, equally affects all persons and all property within the limits thereof; and is the rule of decision for all questions which arise there. Whoever purchases, lives, or sues there, puts himself under the law of the place. An Englishman in Ireland, Minorca, the Isle of Man, or the plantations, has no privilege distinct from the natives.

The 5th, that the laws of a conquered country continue in force, until they are altered by the conqueror: the absurd exception as to pagans, mentioned in *Calvin's case*, shews the universality and antiquity of the maxim. For that distinction could not exist before the Christian æra; and in all probability arose from the mad enthusiasm of the Croisades. In the present case the capitulation expressly provides and agrees, that they shall continue to be governed by their own laws, until His Majesty's further pleasure be known.

The 6th, and last proposition is, that if the King (and when I say the King, I always mean the King without the concurrence

of Parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legislation being subordinate, that is, subordinate to his own authority in Parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for instance, from the laws of trade, or from the power of Parliament, or give him privileges exclusive of his other subjects; and so in many other instances which might be put.

But the present change, if it had been made before the 7th October 1763, would have been made recently after the cession of Grenada by treaty, and is in itself most reasonable, equitable, and political; for it is putting Grenada, as to duties, on the same footing with all the British Leeward Islands. If Grenada paid more it would have been detrimental to her; if less, it must be detrimental to the other Leeward Islands; nay, it would have been carrying the capitulation into execution, which gave the people of Grenada hopes, that if any new tax was laid on, their case would be the same with their fellow subjects in the other Leeward Islands.

The only question then on this first point is, whether the King had a power to make such change between the 10th of February, 1763, the day the treaty of peace was signed, and the 7th October, 1763? Taking these propositions to be true which I have stated; the only question is, whether the King had of himself that power?

It is left by the constitution to the King's authority to grant or refuse a capitulation: if he refuses, and puts the inhabitants to the sword or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection and grants them their property, he has a power to fix such terms and conditions as he thinks proper. He is intrusted with making the treaty of peace: he may yield up the conquest, or retain it upon what terms he pleases. These powers no man ever disputed, neither has it hitherto been controverted that the King might change part or the whole of the law or political form of government of a conquered dominion.

To go into the history of the conquests made by the Crown of England.

[His Lordship examined, with reference to this question, the history of the English conquests in Ireland, Wales, Gascony, and elsewhere, and continued:]

It is not to be wondered at that an adjudged case in point has not been produced. No question was ever started before, but that the King has a right to a legislative authority over a conquered country; it was never denied in Westminster-Hall; it never was questioned in Parliament. Coke's report of the arguments and resolutions of the Judges in *Calvin's case*, lays it down as clear. If a King (says the book) comes to a kingdom by conquest, he may change and alter the laws of that kingdom; but if he comes to it by title and descent, he cannot change the laws of himself without the consent of Parliament—7 Rep. 17b. It is plain he alludes to his own country, because he alludes to a country where there is a Parliament.

The authority also of two great names has been cited, who take the proposition for granted. In the year 1722, the assembly of Jamaica being refractory, it was referred to Sir Philip Yorke and Sir Clement Wearge, to know 'what could be done if the assembly should obstinately continue to withhold all the usual supplies.' They reported thus: 'If Jamaica was still to be considered as a conquered island, the King had a right to levy taxes upon the inhabitants; but if it was to be considered in the same light as the other colonies, no tax could be imposed on the inhabitants but by an assembly of the island, or by an Act of Parliament.'

They considered the distinction in law as clear, and an indisputable consequence of the island being in the one State or in the other.

[*His Lordship discussed the question whether Jamaica was in fact a conquered or a settled colony, and concluded that it was a settled colony.*]

A maxim of constitutional law as declared by all the Judges in *Calvin's case*, and which two such men, in modern times, as Sir Philip Yorke and Sir Clement Wearge, took for granted, will require some authorities to shake.

But on the other side, no book, no saying, no opinion has been cited; no instance in any period of history produced, where a doubt has been raised concerning it. The counsel for the plaintiff no doubt laboured this point from a diffidence of what might be our opinion on the second question. But upon the second point, after full consideration we are of opinion, that before the letters patent of the 20th July, 1764, the King had precluded himself from the exercise of a legislative authority over the island of Grenada.

The first and material instrument is the proclamation of the 7th October, 1763. See what it is that the King there says, with what view, and how he engages himself and pledges his word.

'For the better security of the liberty and property of those who are or shall become inhabitants of our island of Grenada, we have declared by this our proclamation, that we have commissioned our governor (as soon as the state and circumstances of the colony will admit), to call an assembly to enact laws,' &c. With what view is this made? It is to invite settlers and subjects: and why to invite? That they might think their properties, &c. more secure if the legislation was vested in an assembly, than under a governor and council only.

Next, having established the constitution, the proclamation of the 20th March, 1764, invites them to come in as purchasers: in further confirmation of all this, on the 9th April, 1764, three months before July, an actual commission is made out to the governor to call an assembly as soon as the state of the island would admit thereof. You observe, there is no reservation in the proclamation of any legislature to be exercised by the King, or by the governor and council under his authority in any manner, until the assembly should meet; but rather the contrary: for whatever construction is to be put upon it, which, perhaps, may be very difficult through all the cases to which it may be applied, it alludes to a government by laws in being, and by Courts of Justice, not by a legislative authority, until an assembly should be called. There does not appear from the special verdict, any impediment to the calling an assembly immediately on the arrival of the governor, which was in December, 1764. But no assembly was called then or at any time afterwards, till the end of the year 1765.

We therefore think, that by the two proclamations and the commission to Governor Melville, the King had immediately and irrecoverably granted to all who were or should become inhabitants, or who had, or should acquire property in the island of Grenada, or more generally to all whom it might concern, that the subordinate legislation over the island should be exercised by an assembly with the consent of the governor and council, in like manner as the other islands belonging to the King.

Therefore, though the abolishing the duties of the French King and the substituting this tax in its stead, which according to the finding in this special verdict is paid in all the British Leeward

Islands, is just and equitable with respect to Grenada itself, and the other British Leeward Islands, yet, through the inattention of the King's servants, in inverting the order in which the instruments should have passed, and been notoriously published, the last Act is contradictory to, and a violation of the first, and is, therefore, void. How proper soever it may be in respect to the object of the letters patent of the 20th July, 1764, to use the words of Sir Philip Yorke and Sir Clement Wearge, 'It can only now be done, by the assembly of the island, or by an Act of the Parliament of Great Britain.'

The consequence is, judgment must be given for the plaintiff.

PHILLIPS v. EYRE, (1870) L. R. 6 Q. B. 1

EXCHEQUER CHAMBER

The judgment of the Court (Kelly C.B., Martin, Channell, Pigott, and Cleasby BB., Willes and Brett JJ.) was delivered by

WILLES J.—This is an action complaining of false imprisonment and other injuries to the plaintiff by the defendant in the island of Jamaica. The plea states in effect that the defendant was governor of the island; that a rebellion broke out there which the governor and others acting under his authority had arrested by force of arms; that an Act was afterwards duly passed by the legislature of the island, and received the royal assent, by which, after reciting the rebellion, a proclamation of martial law within certain local limits by the governor with the advice of a council of war, that the rebellion had been suppressed and imminent general sacrifice of life thereby averted, that the military, naval, or civil authorities might, according to the law of ordinary peace, be responsible in person or purse for acts done in good faith for the purpose of restoring public peace and quelling the rebellion, and that all persons who in good faith and loyal resolve had acted for the crushing of the rebellious outbreak ought to be indemnified and kept harmless for such their acts of loyalty, it was enacted by the governor, legislative council, and assembly of the island, amongst other things that the defendant and all officers and other persons who had acted under his authority, or had acted *bonâ fide* for the purpose and during the existence of martial law, whether done in any district in which martial law was proclaimed

or not, were thereby indemnified in respect of all acts, matters, and things done in order to put an end to the rebellion, and all such acts were 'thereby made and declared lawful, and were confirmed.' The plea further states that the grievances complained of in this action were measures used in the suppression of the rebellion, and were reasonably and in good faith considered by the defendant to be proper for the purpose of putting an end to, and bonâ fide done in order to put an end to, the rebellion, and so were included in the indemnity. To this plea the plaintiff demurred, and also replied that the defendant as governor was, by the law of Jamaica, a necessary party to the making of the Act. The defendant demurred to that replication, and issues in law were raised upon the validity of the plea and replication, upon which issues the Court of Queen's Bench gave judgment for the defendant, whereupon the plaintiff has assigned error.

The case was very fully argued at the sittings after Hilary Term, by Mr. Quain for the plaintiff and Mr. Mellish for the defendant, when we took time to consider.

It was agreed at the bar that, for the purpose of this argument, the decision ought to turn upon the Colonial Act, and numerous objections were urged against its validity and effect. Before discussing these objections in detail it may be convenient to consider generally the condition of the governor of a colony and other subjects of Her Majesty there in case of open rebellion. To a certain extent their duty is clear to do their best and utmost in suppressing the rebellion. Even as to tumultuous assemblies and riots of a dangerous character, though not approaching to actual rebellion, Tindal C.J., in his charge to the Bristol grand jury on the special commission upon the occasion of the riots in 1832 (5 C. & P. at p. 262), there, in accordance with many authorities, stated the law as to private citizens.

[*The learned Judge quoted from the charge of Tindal C.J. (see p. 360 above.)*]

This perilous duty, shared by the governor with all the Queen's subjects, whether civil or military, is in an especial degree incumbent upon him as being entrusted with the powers of government for preserving the lives and property of the people and the authority of the Crown; and if such duty exist as to tumultuous assemblies of a dangerous character, the duty and responsibility in case of open rebellion are heightened by the consideration that

the existence of law itself is threatened by force of arms and a state of war against the Crown established for the time. To act under such circumstances within the precise limits of the law of ordinary peace is a difficult and may be an impossible task, and to hesitate or temporize may entail disastrous consequences. Whether the proper, as distinguished from the legal, course has been pursued by the governor in so great a crisis, it is not within the province of a court of law to pronounce. Nor are we called upon to offer any judicial opinion as to the lawfulness or propriety of what was done in the present case, apart from the validity and legalizing effect of the colonial Act. It is manifest, however, that there may be occasions in which the necessity of the case demands prompt and speedy action for the maintenance of law and order at whatever risk, and where the governor may be compelled, unless he shrinks from the discharge of paramount duty, to exercise *de facto* powers which the legislature would assuredly have confided to him if the emergency could have been foreseen, trusting that whatever he has honestly done for the safety of the state will be ratified by an Act of indemnity and oblivion. There may not be time to appeal to the legislature for special powers. The governor may have, upon his own responsibility, acting upon the best advice and information he can procure at the moment, to arm loyal subjects, to seize or secure arms, to intercept munitions of war, to cut off communication between the disaffected, to detain suspected persons, and even to meet armed force by armed force in the open field. If he hesitates, the opportunity may be lost of checking the first outbreak of insurrection, whilst by vigorous action the consequences of allowing the insurgents to take the field in force may be averted. In resorting to strong measures he may have saved life and property out of all proportion to the mistakes he may honestly commit under information which turns out to have been erroneous or treacherous. The very efficiency of his measures may diminish the estimate of the danger with which he had to cope, and the danger once past, every measure he has adopted may be challenged as violent and oppressive, and he and every one who advised him, or acted under his authority, may be called upon, in actions at the suit of individuals dissatisfied with his conduct, to establish the necessity or regularity of every act in detail by evidence which it may be against public policy to disclose. (See the recitals of the Indemnity Act, 41 Geo. 3,

c. 66.) The bare litigation to which he and those who acted under his authority may be exposed, even if defeated by proving the lawfulness of what was done, may be harassing and ruinous. Under these and like circumstances it seems to be plainly within the competence of the legislature, which could have authorized by antecedent legislation the acts done as necessary or proper for preserving the public peace, upon a due consideration of the circumstances to adopt and ratify like acts when done, or, 'in the language of the law under consideration, to enact that they shall be 'made and declared lawful and confirmed.' Such is the effect of the Act of Indemnity in question, which follows the example of similar legislation in the mother country and in other dominions and colonies of the Crown.

[He examined the history of the passing of Acts of Indemnity in England, Ireland, and the Colonies.]

This series of precedents was acknowledged to exist; but it was contended that they were misleading, and that the colonial Act was, notwithstanding, either altogether unauthorized and futile, or at least unavailing as regarded the defendant, or that, if valid, its operation was restricted to the limits of the island, and ineffectual to bar an action in any other part of Her Majesty's dominions. We proceed to consider these various objections.

Doubts were suggested in this court upon what was taken for granted in the argument and judgment in the court below, namely, the power of the Crown to create a legislative assembly in a settled colony. Assuming, but by no means affirming (See the judgment of *Beaumont v. Barrett*, (1836) 1 Moo. P. C. at p. 78, not overruled upon this point. See also 6 St. Tr. 1849; 20 St. Tr. 801) that, as contended for by counsel for the plaintiff, the colony in question, though originally conquered from the Spaniards, is now to be deemed a settled as distinguished from a conquered or ceded one, we consider these doubts as to the power of the Crown and of the local legislature to be unfounded. There is even greater reason for holding sacred the prerogative of the Crown to constitute a local legislature in the case of a settled colony, where the inhabitants are entitled to be governed by English law, than in that of a conquered colony, where it is only by grace of the Crown that the privilege of self-government is allowed, though where once allowed it cannot be recalled. In colonies distant from the mother-country to which writs to return members to the imperial parlia-

ment do not run, it is essential, both for the due government of the country in dealing with matters best understood upon the spot, and with emergencies which do not admit of delay, and also for giving subjects there resident the benefit of a voice, by their representatives, in the councils by which they are taxed and governed, that the Crown should have the power of creating a local parliament.

Accordingly, it is certain that the Crown has, in numerous instances, granted charters under which houses of assembly and legislative councils have been established for the government of colonies, whether conquered or settled, and that such councils and assemblies have, from time to time, made laws suited to the 'emergencies of the colony,' which, of course, include all measures necessary for the conservation of peace, order, and allegiance therein. In effect, the inhabitants have been allowed to reserve the power of self-government, through their representatives in the colony, subject to the approval of the Crown and the control of the imperial legislature. *Beckford v. Wade*, (1805) 17 Ves. 87, in which the Limitation Act of Jamaica was held to bar the title, and not merely the remedy, is one of many instances in which the force of such legislation has been recognized here. And its lawfulness was taken for granted by Lord Wensleydale, in the leading case of *Kielly v. Carson*, (1842) 4 Moo. P. C. at p. 84, in a judgment of the weightiest authority delivered after two arguments, the second of which took place before eleven members of the Judicial Committee, comprising, besides Lord Wensleydale himself, Lord Lyndhurst, Lord Brougham, Lord Cottenham, Lord Campbell, Lord Chief Justice Tindal, and Dr. Lushington. In that judgment Lord Wensleydale, after observing that Newfoundland was a settled, not a conquered, colony, added: 'To such a colony there is no doubt that the settlers from the mother-country carried with them such portion of its common and statute law as was applicable to their new situation, and also the rights and immunities of British subjects. Their descendants have, on the one hand, the same laws and the same rights, unless they have been altered by parliament; and on the other hand, the Crown possesses the same prerogative and the same powers of government that it does over its other subjects; nor has it been disputed in the argument before us, and therefore we consider it as conceded, that the sovereign had not merely the right of appointing such

magistrates and establishing such corporations and courts of justice as he might do by the common law at home, but also that of creating a local legislative assembly, with authority subordinate, indeed, to that of parliament, but supreme within the limits of the colony for the government of its inhabitants.'

This opinion was reflected upon in the argument, but it is in accordance with just principles of government, with the law laid down by the text-writers, including Mr. Justice Blackstone (1 Bla. Com. 107, 108); and it has now been drawn into doubt for the first time. We are satisfied that it is sound law, and that a confirmed act of the local legislature lawfully constituted, whether in a settled or conquered colony, has, as to matters within its competence and the limits of its jurisdiction, the operation and force of sovereign legislation, though subject to be controlled by the imperial parliament.

The authorities cited for holding void certain Acts of colonial assemblies ordering imprisonment for contempt are inapplicable, being either cases in which there was no legislation, or cases in which the only question was whether the local legislation fulfilled the conditions assumed to be imposed by a governing Act of the Imperial Parliament, and those conditions were held to have been fulfilled.¹

It was further argued that the Act in question was contrary to the principles of English law, and therefore void. This is a vague expression, and must mean either contrary to some positive law of England, or to some principle of natural justice, the violation of which would induce the Court to decline giving effect even to the law of a foreign sovereign state. In the former point of view, it is clear that the repugnancy to English law which avoids a colonial Act means repugnancy to an imperial statute or order made by authority of such statute applicable to the colony by express words or necessary intendment; and that, so far as such repugnancy extends, and no further, the colonial Act is void. The 28 & 29 Vict. c. 63, s. 2, enacts that, 'Any colonial law which is, or shall be, in any respect repugnant to the provisions of any Act of parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act,

¹ *Sic*. Clearly a negative has been omitted [Ed.].

order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.' And to remove all doubt, s. 3 of the same Act affirmatively enacts that 'No colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provision of some such Act of parliament, order, or regulation as aforesaid.' To what Act, order, or regulation, then, is the Jamaica Act of Indemnity and oblivion repugnant? It was argued to be repugnant to the Governors Act, 11 & 12 Wm. 3, c. 12, by which any governor who shall be guilty of oppressing any of Her Majesty's subjects within this government or of any other crime or offence, may be tried and punished by indictment before the Court of King's Bench, or a special commission appointed by the Crown; and further remedy is provided in such a case by 42 Geo. 3, c. 85. The argument, therefore, is, that because the imperial legislature has provided that for oppression, crime, or offence of a governor he shall be criminally answerable in this country, therefore it ought to be held incompetent for the local legislature to protect him by an Act of indemnity or oblivion against the civil consequences of excessive zeal, however sincere, or mistaken exertions, however honest, in the suppression of a rebellion. In dealing with this argument, it should be borne in mind that upon an indictment against a governor for conduct alleged to be oppressive and criminal, circumstances, and above all motives, may be taken into account, which would be excluded in deciding the dry question of civil liability; and that the proceedings upon such indictment, as in all other criminal cases, would be subject to the control and restraint of the Crown. Whether the assent of the Crown had, pro tanto, the effect of an amnesty might be a point worth considering, if necessary. Supposing that it had not, the proper course to test the alleged criminal responsibility is not by civil action, with a suggestion of a possible indictment, but by actual indictment presented if the facts warrant such a proceeding. If that course cannot be successfully resorted to, the objection of its possibility is a phantom; and if it can, the restraint of a civil action cannot affect its success. In this point of view, therefore, the operation of the colonial Acts upon the present action is not 'repugnant to the law of England.'

Another objection affecting the defendant personally was, that he was a necessary party to the passing of the Act, and, therefore,

could take no benefit thereunder. This objection is founded upon a supposed analogy between legislative and judicial proceedings. In the latter, as a rule, the judgment of an interested judge is voidable and liable to be set aside by prohibition, error, or appeal, as the case may be; but it is not absolutely void, and persons acting under the authority of such a judgment before it is set aside by competent authority would not be liable to be treated as trespassers. This was the opinion of the judges acted upon by the House of Lords in *Dimes v. Grand Junction Canal Co.*, (1846) 8 H. L. C. 759-786; and, in case of necessity, as where all the judges of a court having exclusive jurisdiction over the subject-matter happen to be interested, the objection cannot prevail (*Ibid.* and per Lord Cranworth in *Ranger v. Great Western Railway Co.*, (1854) 5 H. L. C. at p. 88). The supposed analogy between judicial and legislative proceedings is, moreover, imperfect. The governor is no more a party to the colonial Act than the Legislative Council or House of Assembly, or, in legal theory, every inhabitant of the island represented therein. If the objection were just in the case of a governor, then by like reasoning the Crown could derive no benefit from any Act of Parliament; a result alike contrary to experience and reason. The further objection to that section of the colonial Act which empowers the governor for the time being to decide whether any particular act falls within its provisions does not arise. That section (which follows former precedents) does not appear to have been acted upon, and is not founded upon in the plea. Whether it be valid in this country may depend upon the further question, whether it only affects procedure and evidence, or authorizes a judgment in rem as to the character of particular acts.

It was further objected, that the colonial law was contrary to natural justice, as being retrospective in its character, and taking away a right of action once vested, and that for this reason, like a foreign law against natural justice, it could have no extra-territorial force. Retrospective laws are, no doubt, *primâ facie* of questionable policy, and contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law. '*Leges et constitutiones futuris certum est dare formam negotiis non ad*

facta præterita revocari; nisi nominatim et de præterito tempore et adhuc pendentibus negotiis cautum sit.' Accordingly, the Court will not ascribe retrospective force to new laws affecting rights, unless by express words or necessary implication it appears that such was the intention of the legislature. But to affirm that it is naturally or necessarily unjust to take away a vested right of action by act subsequent, is inconsistent both with the common law of England and the constant practice of legislation. If (for instance from the common law) a mere stranger, acting without authority at the time, takes upon him to do an act of trespass in the name and for the benefit of an absent person, such professed agent becomes liable for his unauthorized act, and a right of action is acquired by the person against whom the wrong was committed; and yet the general rule of the common law, borrowed from the civil law, is that the person in whose name the act was done may, if he thinks fit, afterwards ratify and adopt it. Such ratification has the effect of a prior authority, and the result is, that if the prior authority of the principal would not have justified the act, both the agent and the principal may be sued as trespassers; and that, if such authority would have justified the act—that is, if the principal could lawfully have authorized it beforehand, then the agent is also justified by matter *ex post facto*, and the vested right of action is extinguished. Nor is the principle applied exclusively to private transactions, in which, if the act be unlawful in itself, ratification does not free the agent from responsibility. It has been equally applied to the exercise of sovereign authority, whereby the act of the agent, though originally unlawful, becomes by after ratification an act of state, the original right of action is divested, and all civil liability extinguished.

[*He referred to Buron v. Denman* (see p. 295 above) *and to The Rolla*, (1807) 6 Rob. Adm. 364.]

The parties in these latter cases were foreigners, but that circumstance only touches the power of the Crown, and does not affect the question under consideration, whether it be against natural justice, which is due to all mankind alike, native or foreign, that a right of action should be divested by subsequent confirmation of competent authority, and it is clear that the common law of England does not so regard it. Turning to legislation, the same principle becomes more manifest, from the multitude of instances in which it has been applied. The statute book of every

parliament in this century (beginning with 41 Geo. 3, c. 66, for indemnifying against actions for the arrest of persons suspected of treason) contains an Act or Acts of Indemnity or otherwise retrospective by which numerous rights of action have been swept away. One instance of retrospective legislation obviously just, to render valid the acts of persons who had fallen honestly into error, and by which infinite actions were killed in embryo, may suffice. When the result of the judgment, finally affirmed by the House of Lords, in *The Queen v. Millis*, (1844) 10 Cl. & F. 534, was to declare null and void numerous marriages celebrated in Ireland by Presbyterian ministers and others not episcopally ordained, one effect of the decision was to disclose, by the new light thrown upon the relations of families previously supposed to be legitimate, a prospect of vast and interminable litigation, springing from a host of vested rights of action of every description. This result was averted (in so far as it was possible without making persons liable to prosecution who were not so liable before) by the Acts 5 & 6 Vict. c. 118, 6 & 7 Vict. c. 39, and 7 & 8 Vict. c. 81, s. 83. By these beneficial and just statutes the past marriages were ratified and confirmed as from the beginning, for it was in terms enacted that they should 'be adjudged and taken to have been and to be' of the same force and effect as if canonically had and solemnized. A more general Act was afterwards passed to render valid certain marriages celebrated abroad, upon which doubt had been thrown by the same decision, 12 & 13 Vict. c. 68, s. 20. Indeed, it would fill a long chapter in history to enumerate all the instances of retrospective legislation.

The retrospective Attainder Acts of earlier times, when the principles of law were not so well understood or so closely regarded as in the present day, and which are now looked upon as barbarous and loosely spoken of as *ex post facto* laws, were of a substantially different character. They did not confirm irregular acts, but voided and punished what had been lawful when done. Mr. Justice Blackstone (1 Bla. Com. 46) describes laws *ex post facto* of this objectionable class as those by which 'after an action indifferent in itself is committed, the legislature then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it. Here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had there-

fore no cause to abstain from it, and all punishment for not abstaining must of consequence be cruel and unjust.'

[He further illustrated the distinction between ex post facto laws and retrospective legislation by reference to the American cases of Calder v. Bull (3 Dallas 386) and Charles River Bridge v. Warren Bridge (11 Peters 420).]

In fine, allowing the general inexpediency of retrospective legislation, it cannot be pronounced naturally or necessarily unjust. There may be occasions and circumstances involving the safety of the state, or even the conduct of individual subjects, the justice of which, prospective laws made for ordinary occasions and the usual exigencies of society for want of prevision fail to meet, and in which the execution of the law as it stood at the time may involve practical public inconvenience and wrong, summum jus summa injuria. Whether the circumstances of the particular case are such as to call for special and exceptional remedy is a question which must in each case involve matter of policy and discretion fit for debate and decision in the parliament which would have had jurisdiction to deal with the subject-matter by preliminary legislation, and as to which a court of ordinary municipal law is not commissioned to inquire or adjudicate.

[He briefly discussed and disposed of the cases of Ogden v. Folliott, (1790) 3 T. R. 726, and Wolff v. Oxholm, (1817) 6 M. & S. 92, which had been referred to in argument in support of this objection.]

The last objection to the plea of the colonial Act was of a more technical character; that assuming the colonial Act to be valid in Jamaica and a defence there, it could not have the extra-territorial effect of taking away the right of action in an English court. This objection is founded upon a misconception of the true character of a civil or legal obligation and the corresponding right of action.

[He examined the question, and concluded that where an obligation, ex delicto, to pay damages is discharged and avoided by the law of the country where it is made, the accessory right of action in every court open to the plaintiff is in like manner discharged and avoided.]

We have thus discussed the validity of the defence upon the only question argued by counsel, touching the effect of the colonial Act, but we are not to be understood as thereby intimating any opinion that the plea might not be sustained upon more general grounds as shewing that the acts complained of were incident to

the enforcement of martial law. It is, however, unnecessary to discuss this further question, because we are of opinion with the Court below that the colonial Act of Indemnity, even upon the assumption that the acts complained of were originally actionable, furnishes an answer to the action.

The judgment of the Court of Queen's Bench for the defendant was right, and is affirmed.

Judgment affirmed.

NADAN v. THE KING, [1926] A. C. 482

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C.—These are appeals from two judgments of the Appellate Division of the Supreme Court of Alberta dismissing appeals against convictions by a police magistrate; and, in the course of the argument, important questions have been raised as to the royal prerogative and as to the jurisdiction of this Board.

On the night of September 29–30, 1924, the appellant, who was in the employment of a firm of carriers in Fernie, in the Province of British Columbia, was driving a motor car containing a consignment of intoxicating liquor from Fernie through the Province of Alberta to Sweet Grass, Montana, in the United States of America. Whilst in the neighbourhood of Coleman, in the Province of Alberta, in the course of this journey he was arrested by the Alberta Provincial police; and, on the following morning, September 30, 1924, he was charged before a police magistrate at Blairmore, Alberta, (a) with having liquor within the Province of Alberta without the package containing the same being or having been sealed with the official seal prescribed by the Government Liquor Control Board of Alberta, contrary to the Government Liquor Control Act of Alberta (ch. 14 of the Statutes of Alberta, 1924), and (b) with carrying or transporting through the Province of Alberta intoxicating liquor otherwise than by means of a common carrier by water or by railway, contrary to the provisions of the Canada Temperance Act (R. S. Can., c. 152), as amended by 10 Geo. 5, c. 8. These charges were duly heard before

the police magistrate, who, on October 14, 1924, convicted the appellant on both charges.

[His Lordship described the sentences.]

The appellant carried both these decisions to the Appellate Division of the Supreme Court of Alberta, the first by an appeal by way of stated case and the second by motion by way of certiorari to quash the conviction; but that Court (by a majority) dismissed both appeals, the conviction on the second charge being amended in minor respects. By order dated February 19, 1925, the Appellate Division of the Supreme Court of Alberta granted to the appellant leave to appeal to His Majesty in Council from the judgments of that Division and to consolidate the appeals.

On May 5, 1925, the respondent presented a petition to His Majesty in Council, asking that the appeals might be quashed or dismissed as incompetent, mainly on the ground that the appeals were brought in criminal cases, and that, by virtue of s. 1025 of the Criminal Code of Canada, no Court in Canada had jurisdiction to grant leave to appeal to the King in Council in criminal cases. Some technical objections were also taken to the appeal. Upon this petition coming on for hearing, the questions raised were adjourned to be dealt with on the hearing of the appeals; and a petition for special leave to appeal, which had been lodged by the appellant, was adjourned in like manner.

Leave was given to His Majesty's Attorney-General and to the Attorney-General for Canada to intervene, and they have intervened accordingly and have taken part in the argument.

It is convenient before considering the merits of the appeals to deal with the questions which have been raised as to the validity and effect of s. 1025 of the Criminal Code, which runs as follows: '1025. Notwithstanding any royal prerogative, or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any court of appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard.' It was argued on behalf of the appellant that neither of these appeals was brought in a 'criminal case' within the meaning of the above section; but, in their Lordships' opinion, this argument cannot prevail. In each of the cases the appellant was charged with an offence against the public law, and a sentence of imprisonment could be, and was, imposed. An

attempt was made to distinguish the appeal against the conviction under the Government Liquor Control Act of Alberta from the appeal against the conviction under the Canada Temperance Act.

[*The Court, following Rex v. Nat Bell Liquors*, [1922] 2 A. C. 128, 167, *refused to accept the distinction.*]

Their Lordships proceed, therefore, to consider the effect of s. 1025 on the assumption that it applies to these appeals. Having regard to the course taken by the argument, it appears that one question only falls to be decided in this case—namely, whether that section prevents the King in Council from granting special leave to appeal. The Attorney-General, who argued the case for the Crown, did not contest the view that, having regard to the provisions of s. 1025, it was not open to the Supreme Court of Alberta to give leave to appeal in this case—presumably on the ground that the Dominion Parliament, having exclusive legislative authority in respect of the procedure in criminal matters throughout Canada, had power to deprive the Canadian Courts of any jurisdiction to grant leave to appeal in those matters. In these circumstances their Lordships will assume, for the purposes of this case, that the leave to appeal granted by the Supreme Court was ineffective, and they will confine their decision to the question whether the Board can and should advise the granting of special leave to appeal.

It was suggested by the Attorney-General that, as the section provides only that 'no appeal shall be brought' in a criminal case, it may be construed as applying only to appeals originating in the Dominion and not to appeals for which special leave may be granted by His Majesty on the advice of this Board. But having regard to the reference in the section to the royal prerogative, their Lordships have difficulty in putting upon it the limited construction which is suggested; and they think it right to deal with the matter upon the footing that the section was intended to apply even to appeals brought by special leave granted under the prerogative, and to consider whether the section, so far as it applies to such appeals, is or is not valid.

[*It has not been necessary to decide this point in any previous case.*]

It is very desirable that a decision upon the question should now be reached.

The practice of invoking the exercise of the royal prerogative by way of appeal from any Court in His Majesty's Dominions has

long obtained throughout the British Empire. In its origin such an application may have been no more than a petitory appeal to the Sovereign as the fountain of justice for protection against an unjust administration of the law; but if so, the practice has long since ripened into a privilege belonging to every subject of the King. In the United Kingdom the appeal was made to the King in Parliament, and was the foundation of the appellate jurisdiction of the House of Lords; but in His Majesty's Dominions beyond the seas the method of appeal to the King in Council has prevailed and is open to all the King's subjects in those Dominions. The right extends (apart from legislation) to judgments in criminal as well as in civil cases: see *Reg. v. Bertrand*, (1867) L. R. 1 P. C. 520. It has been recognized and regulated in a series of statutes, of which it is sufficient to mention two—namely, the Judicial Committee Act, 1833 (3 & 4 Will. 4, c. 41), and the Judicial Committee Act, 1844 (7 & 8 Vict. c. 69). The Act of 1833 recites that 'from the decisions of various courts of judicature in the East Indies and in the Plantations, Colonies and other Dominions of His Majesty abroad, an appeal lies to His Majesty in Council,' and proceeds to regulate the manner of such appeal; and the Act of 1844, after reciting that 'the Judicial Committee, acting under the authority of the said Acts [the Act of 1833 and an amending Act] hath been found to answer well the purposes for which it was so established by Parliament, but it is found necessary to improve its proceedings in some respects for the better despatch of business and expedient also to extend its jurisdiction and powers,' enacts (in s. 1) that it shall be competent to Her Majesty by general or special Order in Council to 'provide for the admission of any appeal or appeals to Her Majesty in Council from any judgments, sentences, decrees or orders of any Court of justice within any British Colony or Possession abroad.' These Acts, and other later statutes by which the constitution of the Judicial Committee has from time to time been amended, give legislative sanction to the jurisdiction which had previously existed.

Under what authority, then, can a right so established and confirmed be abrogated by the Parliament of Canada? The British North America Act, by s. 91, empowered the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to matters not coming within the classes of subjects by that Act assigned exclusively to the Legislatures of the Pro-

vinces; and in particular it gave to the Canadian Parliament exclusive legislative authority in respect of 'the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters.' But however widely these powers are construed they are confined to action to be taken in the Dominion; and they do not appear to their Lordships to authorize the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal. Further, by s. 2 of the Colonial Laws Validity Act, 1865, it is enacted that 'any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament or having in the Colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.' In their Lordships' opinion s. 1025 of the Canadian Criminal Code, if and so far as it is intended to prevent the Sovereign in Council from giving effective leave to appeal against an order of a Canadian Court, is repugnant to the Acts of 1833 and 1844 which have been cited, and is therefore void and inoperative by virtue of the Act of 1865. It is true that the Code has received the royal assent, but that assent cannot give validity to an enactment which is void by Imperial statute. If the prerogative is to be excluded, this must be accomplished by an Imperial statute; and in fact the modifications which were deemed necessary in respect of Australia and South Africa were effected in that way: see Commonwealth of Australia Act, 1900, s. 74, and Union of South Africa Act, 1909, s. 106.

Before parting with this question, it is desirable to consider certain previous decisions of the Board upon which arguments have been based. In *Cuvillier v. Aylwin*, (1892) 2 Knapp 72, the Legislature of Lower Canada having passed an Act limiting the right of appeal to His Majesty in Council, the Board gave effect to that Act by refusing to hear an appeal which was in contravention of it; but, as has been pointed out in later cases, the Act of the Legislature of Lower Canada there in question was expressly authorized by the British Act of Parliament commonly called the Canada Act (81 Geo. 3, c. 81), which empowered the Legislature of Lower Canada to limit and define the right of appeal: see

5 Moo. P. C. 294, 304; 15 Moo. P. C. 193; and 5 App. Cas. 417. In *Reg. v. Ames*, (1841) 3 Moo. P. C. 409, a Jersey ordinance having declared that no appeal was admissible in criminal cases, Baron Parke, speaking for this Board, declined to admit that the Board had not power to advise His Majesty to allow an appeal. In *Reg. v. Eduljee Byramjee*, (1846) 5 Moo. P. C. 276, effect was given to a provision in the Bombay Charter of 1823 authorizing the Supreme Court of Judicature of Bombay to deny an appeal to any party aggrieved by a decision of that Court; but it was pointed out that the charter was granted under the express authority of an Act of the British Parliament (4 Geo. 4, c. 71) and that its provisions were valid on that ground. The same observation applies to the case of *Reg. v. Alloo Paroo*, (1847) 5 Moo. P. C. 296, where the point was further discussed in the judgment of Lord Brougham. In *Théberge v. Laudry*, (1877) 2 App. Cas. 102, where the Legislature of Quebec, in creating a special tribunal for the trial of election petitions, had declared that the judgments of that tribunal should not be susceptible of appeal, it was held that this provision prevented an appeal to His Majesty in Council; but Lord Cairns, in declaring the decision of the Board to that effect, rested the decision upon the peculiar character of the enactment, and held that it was the intention of the Quebec Legislature, when creating a special tribunal, not to create it with the ordinary incident of an appeal to the Crown. In *Cushing v. Dupuy*, (1880) 5 App. Cas. 409, the Board, while holding that the Dominion Parliament in creating a tribunal for dealing with the subjects of bankruptcy and insolvency had power to declare the decisions of that tribunal to be final, held also that the enactment did not derogate from the prerogative of the Sovereign to allow such appeal as an act of grace. Sir Montagu Smith, in declaring the decision of the Board, reviewed *Cuvillier v. Aylwin*, (1832) 2 Knapp 72, and other cases. In *Wi Matua's Will*, [1903] A. C. 448, it was held by this Board that the royal prerogative could not be excluded, even by Imperial statute, except by express words. In *Webb v. Outtrim*, [1907] A. C. 81, where it was argued that the Commonwealth Judiciary Act of Australia had indirectly prevented an appeal to His Majesty in Council, this Board held that the Commonwealth Parliament had no authority to pass an enactment having that effect; and Lord Halsbury in his judgment, given on behalf of the Board, expressed agreement with the statement of Hodges J. in the Supreme Court

of Victoria that 'in such an important matter direct authority would be given or none at all', and with the following passage from the judgment of the same learned judge: 'If the Federal Legislature had passed an Act which said that hereafter there shall be no right of appeal to the King in Council from a decision of the Supreme Court of Victoria in any of the following matters, and had then set out a number of matters, including that now under consideration, I should have felt no doubt that such an Act was outside the power of that Federal Legislature. And, in my opinion, it is outside their power to do that very thing in a roundabout way.'

In the case of *In re Initiative and Referendum Act*, [1919] A. C. 985, 948, Lord Haldane, in declaring the judgment of the Board, referred to 'the impropriety in the absence of clear and unmistakable language of construing s. 92 as permitting the abrogation of any power which the Crown possesses through a person directly representing it'; an observation which applies with equal force to s. 91 of the Act of 1867 and to the abrogation of a power which remains vested in the Crown itself. Upon a review of these authorities, it appears to their Lordships that they contain nothing inconsistent with the conclusion which their Lordships have reached upon principle, and that, so far as they go, they support that conclusion.

It remains to consider whether in the case of the two judgments now under consideration His Majesty should be advised to grant special leave to appeal. Their Lordships have no hesitation in answering this question in the negative. It has for many years past been the settled practice of the Board to refuse to act as a Court of criminal appeal, and to advise His Majesty to intervene in a criminal case only if and when it is shown that, by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done. This practice and the reasons for it were clearly explained in the above-cited case of *Reg. v. Eduljee Byramjee*, (1846) 5 Moo. P. C. 276, 289, where Dr. Lushington pointed out the extreme inconvenience which would arise from permitting a long series of appeals from decisions in criminal cases. This view has been repeated and enforced in a number of later cases, such as *Falkland Islands Co. v. The Queen*, (1863) 1 Moo. P. C. (N.S.) 299; *Reg. v. Dillet*, (1887) 12 App. Cas. 459; *Arnold v. The King-Emperor*, (1914) L. R. 41 I. A. 149; *Ibrahim v. The King*, [1914]

A. C. 599; and *Dal Singh v. The King-Emperor*, (1917) L. R. 44 I. A. 157. Their Lordships have not left out of mind the consideration that the learned judges in the Supreme Court of Alberta deemed these cases to be the proper subjects of appeal. But notwithstanding this, their Lordships must be guided by the established principle which applies with full force to the present application.

The present appeals are clearly not within the category of exceptional cases in which leave to appeal would be advised by this Board. [*His Lordship briefly stated the grounds of conviction and of appeal, and continued;*] The arguments of the appellant were fully heard by the Appellate Division of the Supreme Court of Alberta and were dealt with by the learned judges of that Division in reasoned judgments; and there can be no possible question of a disregard of the forms of legal process or the violation of any principle of natural justice. It is of the utmost importance that a decision on a criminal charge so reached should take immediate effect without a long drawn out process of appeal, and it is undesirable that appeals upon such decisions should be encouraged by the Board.

For these reasons their Lordships will humbly advise His Majesty that these appeals and the two petitions should be dismissed, but (in the circumstances) without costs.

ATTORNEY-GENERAL FOR ONTARIO v. ATTORNEY-GENERAL
FOR CANADA, [1912] A. C. 571

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

The judgment of their Lordships was delivered by

EARL LOREBURN L.C.—The real point raised in this most important case is whether or not an Act of the Dominion Parliament authorizing questions either of law or of fact to be put to the Supreme Court and requiring the judges of that Court to answer them on the request of the Governor in Council is a valid enactment within the powers of that Parliament. Much care and learning have been devoted to the case, and their Lordships are under a deep debt to all the learned judges who have delivered their opinions upon this anxious controversy.

In 1867 the desire of Canada for a definite Constitution em-

bracing the entire Dominion was embodied in the British North America Act. Now, there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada. Numerous points have arisen, and may hereafter arise, upon those provisions of the Act which draw the dividing line between what belongs to the Dominion or to the province respectively. An exhaustive enumeration being unattainable (so infinite are the subjects of possible legislation), general terms are necessarily used in describing what either is to have, and with the use of general terms comes the risk of some confusion, whenever a case arises in which it can be said that the power claimed falls within the description of what the Dominion is to have, and also within the description of what the province is to have. Such apparent overlapping is unavoidable, and the duty of a Court of law is to decide in each particular case on which side of the line it falls in view of the whole statute.

In the present case, however, quite a different contention is advanced on behalf of the provinces. It is argued, indeed, that the Dominion Act authorizing questions to be asked of the Supreme Court is an invasion of provincial rights, but not because the power of asking such questions belongs exclusively to the provinces. The real ground is far wider. It is no less than this—that no Legislature in Canada has the right to pass an Act for asking such questions at all. This is the feature of the present appeal which makes it so grave and far-reaching. It would be one thing to say that under the Canadian Constitution what has been done could be done only by a provincial Legislature within its own province. It is quite a different thing to say that it cannot be done at all, being, as it is, a matter affecting the internal affairs of Canada, and, on the face of it, regulating the functions of a Court of law, which are part of the ordinary machinery of government in all civilized countries.

Broadly speaking the argument on behalf of the provinces proceeded upon the following lines. They said that the power to ask questions of the Supreme Court, sought to be bestowed upon the Dominion Government by the impugned Act, is so wide in its

terms as to admit of a gross interference with the judicial character of that Court, and, therefore, of grave prejudice to the rights of the provinces and of individual citizens. Any questions, whether of law or fact, it was urged, can be put to the Supreme Court, and they are required to answer it, with their reasons. Though no direct effect is to result from the answer so given, and no right or property is thereby to be adjudged, yet, say the appellants, the indirect result of such a proceeding may be and will be most fatal. When the opinion of the highest Court of Appeal for all Canada has been given upon matters both of law and of fact, it is said it is not in human nature to expect that, if the same matter is again raised upon a concrete case by an individual litigant before the same Court, its members can divest themselves of their preconceived opinions; whereby may ensue not merely a distrust of their freedom from prepossession, but actual injustice, inasmuch as they will in fact, however unintentionally, be biassed. The appellants further insist that although the Act in question provides for requiring argument, and directing that counsel shall be heard before the questions are answered, yet the persons who may be affected by the answers cannot be known beforehand, and therefore will be prejudiced without so much as an opportunity of stating their objections before the Supreme Court has arrived at what will virtually be a determination of their rights.

This view, which was most powerfully presented, has a twofold aspect. It may be regarded as a commentary upon the wisdom of such an enactment. With that this Board is in no sense concerned. A Court of law has nothing to do with a Canadian Act of Parliament, lawfully passed, except to give it effect according to its tenor. No one who has experience of judicial duties can doubt that, if an Act of this kind were abused, manifold evils might follow, including undeserved suspicion of the course of justice and much embarrassment and anxiety to the judges themselves. Such considerations are proper, no doubt, to be weighed by those who make and by those who administer the laws of Canada, nor is any Court of law entitled to suppose that they have not been or will not be duly so weighed. So far as it is a matter of wisdom or policy, it is for the determination of the Parliament. It is true that from time to time the Courts of this and of other countries, whether under the British flag or not, have to consider and set aside, as void, transactions upon the ground that they are against public policy.

But no such doctrine can apply to an Act of Parliament. It is applicable only to the transactions of individuals. It cannot be too strongly put that with the wisdom or expediency or policy of an Act, lawfully passed, no Court has a word to say. All, therefore, that their Lordships can consider in the argument under review is whether it takes them a step towards proving that this Act is outside the authority of the Canadian Parliament, which is purely a question of the constitutional law of Canada.

In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as, for example, when the words establishing two mutually exclusive jurisdictions are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act. Again, if the text says nothing expressly, then it is not to be presumed that the Constitution withholds the power altogether. On the contrary, it is to be taken for granted that the power is bestowed in some quarter unless it be extraneous to the statute itself (as, for example, a power to make laws for some part of His Majesty's dominions outside of Canada) or otherwise is clearly repugnant to its sense. For whatever belongs to self-government in Canada belongs either to the Dominions or to the provinces, within the limits of the British North America Act. It certainly would not be sufficient to say that the exercise of a power might be oppressive, because that result might ensue from the abuse of a great number of powers indispensable to self-government, and obviously bestowed by the British North America Act. Indeed it might ensue from the breach of almost any power.

Is it then to be said that a power to place upon the Supreme Court the duty of answering questions of law or fact when put by the Governor in Council does not reside in the Parliament of Canada? This particular power is not mentioned in the British North America Act, either explicitly or in ambiguous terms. In the 91st section the Dominion Parliament is invested with the duty of making laws for the peace, order, and good government of Canada, subject to expressed reservations. In the 101st section the Dominion is enabled to establish a Supreme Court of Appeal from the provinces. And so when the Supreme Court was established it had and has jurisdiction to hear appeals from the provincial

Courts. But of any power to ask the Court for its opinion there is no word in the Act. All depends upon whether such a power is repugnant to that Act. The provinces by their counsel maintain, in effect, the affirmative. They say that when a Court of Appeal from all the provincial Courts is authorized to be set up, that carries with it an implied condition that the Court of Appeal shall be in truth a judicial body according to the conception of judicial character obtaining in civilized countries and especially obtaining in Great Britain, to whose Constitution the Constitution of Canada is intended to be similar, as recited in the British North America Act, 1867. And they say that to place (*sic*) the duty of answering questions, such as the Canadian Act under consideration does require the Court to answer, is incompatible with the maintenance of such judicial character or of public confidence in it, or with the free access to an unbiassed tribunal of appeal to which litigants in the provincial Courts are of right entitled. This argument in truth arraigns the lawfulness of so treating a Court upon the ground that a Court liable to be so treated ceases to be such a judiciary as the Constitution provides for. The argument on behalf of the provinces was presented substantially as just stated, though not in identical words. But, however presented, no argument which falls short of this could claim serious attention. If, notwithstanding the liability to answer questions, the Supreme Court is still a judiciary within the meaning of the British North America Act, then there is no ground for saying that the impugned Canadian Act is *ultra vires*.

In course of the discussion both here and in the Canadian Courts full reference was made to the law and practice observed by the Judicial Committee, by the House of Lords, and His Majesty's judges.

It appears that the idea of questions being put by the Executive Government to the Supreme Court of Canada was suggested in the first instance by the 4th section of the Act of William IV. For the earliest Canadian Act on this subject (that of 1875) adopts in effect the words of the 4th section. This analogy, no doubt, has some value, inasmuch as this Committee, exercising most important judicial functions, is undoubtedly liable to be asked questions of any kind by the authority of the Crown, and the procedure is used from time to time, though rarely and with a careful regard to the nature of the reference. On the other hand it must be remembered

that the members of the Judicial Committee are all Privy Counsellors, bound as such to advise the Crown when so required in that capacity. Upon the whole, it does seem strange that a Court, for such in effect this is, should have been for three-quarters of a century liable to answer questions put by the Crown, and should have done it without the least suggestion of inconvenience or impropriety, if the same thing when attempted in Canada deserves to be stigmatized as subversive of the judicial functions.

In regard to the House of Lords, there is no doubt that, when exercising its judicial functions as the highest Court of Appeal from the Courts of the United Kingdom, that House has a right to summon the judges and to ask of them such questions as it may think necessary for the decision of a particular case. That is a very different thing from asking questions unconnected with a pending cause as to the state or effect of the law in general. But there is also authority for saying that the House of Lords possesses in its legislative capacity a right to ask the judges what the law is, in order to better inform itself how if at all the law should be altered. The last instance of this being done occurred some fifty years ago, when the right was expressly asserted by Lords of undoubtedly high authority. It is unnecessary further to consider this latter claim of the House of Lords, which in fact has very rarely been put to use, because it is a claim resting upon the unwritten law of the Constitution and said to be within the privilege of one branch of the Legislature, whereas the point to be decided in the present appeal is whether under a particular written Constitution a Parliament can entrust to the Executive Government a similar power. Still it has a bearing upon the supposed intrinsic abhorrence with which their Lordships are asked to regard the putting of questions, otherwise than by litigation, to a Court of law.

Very little assistance is afforded by the almost or altogether obsolete practice of His Majesty's judges in England being questioned by the Crown as to the state of the law, if indeed it can be said that there ever was any legitimate practice of that kind. Since 1760, when Lord Mansfield on behalf of His Majesty's judges did furnish an answer, though with evident reluctance, as to the Crown's right to summon Lord George Sackville before a court-martial, no instance of such a proceeding has been adduced. Earlier practice in bad times is of no weight, and as the unwritten Constitution of England is a growth, not a fabric, it may be that

desuetude for 150 years has rendered unconstitutional, in the sense in which that term is understood in England, any attempt to repeat such an experiment. If the point ever arises it must be settled upon the judges of England either assenting or refusing to comply with the request. It will then be a question what is the duty appertaining to their office, which is a very different question from that now before the Board.

It is more to the purpose to consider what has been the practice in Canada under the British North America Act, and how that practice has been regarded by Courts and the Judicial Committee. The needs of one country may differ from those of another, and Canada must judge of Canadian requirements.

The first step towards authorizing the Executive Government of the Dominion to obtain the opinion of the Supreme Court by a direct request was taken in 1875 by the Canadian Parliament. By the terms of the 1875 Act, any question might be put to the Supreme Court. Since then, in 1891, and again in 1906, fresh Acts were passed providing for the same thing with more detail though not in wider terms, and it is the 1906 Act which gave rise to the present appeal. Between 1875 and to-day the Supreme Court from time to time has been asked and has repeatedly answered questions put to it in accordance with these Acts of the Canadian Parliament. And it is very important that in six instances, between the years 1875 and 1912, the answers given by that Court have been the subject of appeal to the Judicial Committee under a power to appeal which was comprised in the Canadian Acts, and which gave authority to this Board to entertain such appeals, as though they were appeals from the ordinary jurisdiction. In all cases the appeal was entertained; in some cases the answers of the Supreme Court were modified by their Lordships; and in one case Lord Herschell, delivering the opinion of the Board, declined to answer some of the questions upon the ground that so doing might prejudice particular interests of individuals. These circumstances were much and legitimately dwelt upon on behalf of the Canadian Attorney-General as showing that the Acts now alleged to have been *ultra vires* were in fact acted upon, and so treated as valid, not only by the Court in Canada, but also on appeal in Whitehall. It was urged on the other hand for the provinces, and with perfect truth, that in no one of these cases was this point ever raised, and that the Judicial Committee would be indisposed to raise it when

the parties to the appeal concurred in desiring a determination. It seems that this does not dispose of the argument. The Board would certainly be at all times averse to taking any objection which would hinder the ascertainment of any point of law which the parties desired in good faith to have determined. But it is not easy to believe that, if there is any force in the contention of the now appellants, the Judicial Committee would have so often failed even to advert to a departure so serious as is now maintained from what is due to the independence and character of Courts of justice. It is clear indeed that no such apprehension ever occurred to any of the great lawyers who heard those cases. And that circumstance militates very strongly against the view now put forward, that it is repugnant to the British North America Act and subversive of justice to require the Court to answer questions not in litigation.

Great weight ought also to be attached to another significant circumstance. Nearly all the provinces have themselves passed provincial laws requiring their own Courts to answer questions not in litigation, in terms somewhat similar to the Dominion Act which they impugn. If it be said, as it was said, that s. 101 of the British North America Act forbids this being done by the Dominion Parliament, that argument cannot apply to the provincial Legislatures, because s. 101 does not apply to the provinces. Either, then, these provincial Acts are valid, while a similar Act passed by the Dominion is invalid, which seems very strange, or the provincial Acts as well as that of the Dominion are *ultra vires* upon the general ground already dwelt upon, that a Court of justice ceases in effect to be a Court of justice when such a duty is laid upon it. Certainly it is remarkable that for thirty-five years this point of view has apparently escaped notice in Canada, and a contrary view, now said to menace the very essence of justice, has been tranquilly acted upon without question by the Legislatures of the Dominion and provinces, by the Courts in Canada, and by the Judicial Committee ever since the British North America Act established the present Constitution of Canada. It is difficult to resist the conclusion that the point now raised never would have been raised had it not been for the nature of the questions which have been put to the Supreme Court. If the questions to the Courts had been limited to such as are in practice put to the Judicial Committee (e. g. must justices of the peace and judges be resworn after a demise of the Crown?) no one would ever have

thought of saying it was *ultra vires*. It is now suggested because the power conferred by the Canadian Act, which is not and could not be wider in its terms than that of William IV, applicable to the Judicial Committee, has resulted in asking questions affecting the provinces, or alleged to do so. But the answers are only advisory and will have no more effect than the opinions of the law officers. Perhaps another reason is that the Act has resulted in asking a series of searching questions very difficult to answer exhaustively and accurately without so many qualifications and reservations as to make the answers of little value. The Supreme Court itself can, however, either point out in its answer these or other considerations of a like kind, or can make the necessary representations to the Governor-General in Council when it thinks right so to treat any question that may be put. And the Parliament of Canada can control the action of the Executive.

Yet the argument, that to put questions is *ultra vires*, must be the same whether the power is rightly or wrongly used. If you say that it is *intra vires* to put some kinds of question, but *ultra vires* to put other kinds of question, then you will have to draw the line between what may be asked and what may not. That must depend upon what it is judicious or wise to ask, and can in no sense rest upon considerations of law. What in substance their Lordships are asked to do is to say that the Canadian Parliament ought not to pass laws like this because it may be embarrassing and onerous to a Court, and to declare this law invalid because it ought not to have been passed.

Their Lordships would be departing from their legitimate province if they entertained the arguments of the appellants. They would really be pronouncing upon the policy of the Canadian Parliament, which is exclusively the business of the Canadian people, and is no concern of this Board. It is sufficient to point out the mischief and inconvenience which might arise from an indiscriminate and injudicious use of the Act, and leave it to the consideration of those who alone are lawfully and constitutionally entitled to decide upon such a matter.

Their Lordships will therefore humbly advise His Majesty that this appeal ought to be dismissed.

✓ THE LIQUIDATORS OF THE MARITIME BANK OF CANADA v.
THE RECEIVER-GENERAL OF NEW BRUNSWICK [1892] A. C. 487

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

The judgment of their Lordships was delivered by

LORD WATSON:—

This appeal is brought by special leave in a suit which followed upon a case submitted for the opinion of the Supreme Court of the province of New Brunswick, by the appellants, the liquidators of the Maritime Bank of the Dominion of Canada, in the interest of unsecured creditors of the bank, on the one side, and by the Receiver-General of the Province, claiming to represent Her Majesty, on the other. The only facts which it is necessary to refer to are these: that the bank carried on its business in the city of St. John, New Brunswick; and that, at the time when it stopped payment in March, 1887, the provincial government was a simple contract creditor for a sum of \$35,000, being public moneys of the province deposited in the name of the Receiver-General. The case, as originally framed, presented two questions for the decision of the Court; but, owing to the condition of the bank's assets, the first of these has ceased to be of practical importance, and it is only necessary to consider the second, which is in these terms: 'Is the provincial government entitled to payment in full over the other depositors and simple contract creditors of the bank?'

The Supreme Court of New Brunswick unanimously, and, on appeal, the Supreme Court of Canada with a single dissentient voice, have held that the claim of the provincial government is for a Crown debt to which the prerogative attaches, and therefore answered the question in the affirmative.

The Supreme Court of Canada had previously ruled, in *Reg. v. Bank of Nova Scotia*, 11 Sup. Ct. Rep. 1., that the Crown, as a simple contract creditor for public moneys of the Dominion deposited with a provincial bank, is entitled to priority over other creditors of equal degree. The decision appears to their Lordships to be in strict accordance with constitutional law. The property and revenues of the Dominion are vested in the Sovereign, subject to the disposal and appropriation of the legislature of Canada; and the prerogative of the Queen, when it has not been expressly limited by local law or statute, is as extensive in Her Majesty's colonial possessions as in Great Britain. In *Exchange Bank of*

Canada v. The Queen, (1886) 11 App. Cas. 157, this Board disposed of the appeal on that footing, although their Lordships reversed the judgment of the Court below, and negatived the preference claimed by the Dominion Government upon the ground that, by the law of the province of Quebec, the prerogative was limited to the case of the common debtor being an officer liable to account to the Crown for public moneys collected or held by him. The appellants did not impeach the authority of these cases, and they also conceded that, until the passing of the British North America Act, 1867, there was precisely the same relation between the Crown and the province which now subsists between the Crown and the Dominion. But they maintained that the effect of the statute has been to sever all connection between the Crown and the provinces; to make the government of the Dominion the only government of Her Majesty in North America; and to reduce the provinces to the rank of independent municipal institutions. For these propositions, which contain the sum and substance of the arguments addressed to them in support of this appeal, their Lordships have been unable to find either principle or authority.

Their Lordships do not think it necessary to examine, in minute detail, the provisions of the Act of 1867, which nowhere profess to curtail in any respect the rights and privileges of the Crown, or to disturb the relations then subsisting between the Sovereign and the provinces. The object of the Act was neither to weld the provinces into one, nor to subordinate provincial governments to a central authority, but to create a federal government in which they should all be represented, entrusted with the exclusive administration of affairs in which they had a common interest, each province retaining its independence and autonomy. That object was accomplished by distributing, between the Dominion and the provinces, all powers executive and legislative, and all public property and revenues which had previously belonged to the provinces; so that the Dominion Government should be vested with such of these powers, property, and revenues as were necessary for the due performance of its constitutional functions, and that the remainder should be retained by the provinces for the purposes of provincial government. But, in so far as regards those matters which, by sect. 92, are specially reserved for provincial legislation, the legislation of each province continues to be free from the control of the Dominion, and as supreme as it was before

the passing of the Act. In *Hodge v. The Queen*, (1883) 9 App. Cas. 117, Lord Fitzgerald, delivering the opinion of this Board, said: 'When the British North America Act enacted that there should be a legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the province and for provincial purposes in relation to the matters enumerated in sect. 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by sect. 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subject and area, the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion.' The Act places the constitutions of all provinces within the Dominion on the same level; and what is true with respect to the legislature of Ontario has equal application to the legislature of New Brunswick.

It is clear, therefore, that the provincial legislature of New Brunswick does not occupy the subordinate position which was ascribed to it in the argument of the appellants. It derives no authority from the Government of Canada, and its status is in no way analogous to that of a municipal institution, which is an authority constituted for purposes of local administration. It possesses powers, not of administration merely, but of legislation, in the strictest sense of that word; and, within the limits assigned by sect. 92 of the Act of 1867, these powers are exclusive and supreme. It would require very express language, such as is not to be found in the Act of 1867, to warrant the inference that the Imperial Legislature meant to vest in the provinces of Canada the right of exercising supreme legislative powers in which the British Sovereign was to have no share.

In asking their Lordships to draw that inference from the terms of the statute, the appellants mainly, if not wholly, relied upon the fact that, whereas the Governor-General of Canada is directly appointed by the Queen, the Lieutenant-Governor of a province is appointed, not by Her Majesty, but by the Governor-General, who has also the power of dismissal. If the Act had not committed to the Governor-General the power of appointing and removing Lieutenant-Governors, there would have been no room for the argument, which, if pushed to its logical conclusion, would prove

that the Governor-General, and not the Queen, whose Viceroy he is, became the sovereign authority of the province whenever the Act of 1867 came into operation. But the argument ignores the fact that, by sect. 58, the appointment of a provincial governor is made by the 'Governor-General in Council by Instrument under the Great Seal of Canada,' or, in other words, by the Executive Government of the Dominion, which is, by sect. 9, expressly declared 'to continue and be vested in the Queen.' There is no constitutional anomaly in an executive officer of the Crown receiving his appointment at the hands of a governing body who have no powers and no functions except as representatives of the Crown. The act of the Governor-General and his Council in making the appointment is, within the meaning of the statute, the act of the Crown; and a Lieutenant-Governor, when appointed, is as much the representative of Her Majesty for all purposes of provincial government as the Governor-General himself is for all purposes of Dominion government.

The point raised in this appeal, as to the vesting or non-vesting of the public property and revenues of each province in the Sovereign as supreme head of the State, appears to their Lordships to be practically settled by previous decisions of this Board.

The whole revenues reserved to the provinces for the purposes of provincial government are specified in sects. 109 and 126 of the Act. The first of these clauses deals with 'all lands, mines, minerals, and royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union,' which it declares 'shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick, in which the same are situate or arise.' If the Act had operated such a severance between the Crown and the provinces, as the appellants suggest, the declaration that these territorial revenues should 'belong' to the provinces would hardly have been consistent with their remaining vested in the Crown. Yet, in *Attorney-General of Ontario v. Mercer*, (1883) 8 App. Cas. 767; *St. Catherine's Milling and Lumber Company v. The Queen*, (1889) 14 App. Cas. 46; and *Attorney-General of British Columbia v. Attorney-General of Canada*, (1889) 14 App. Cas. 295, their Lordships expressly held that all the subjects described in sect. 109, and all revenues derived from these subjects, continued to be vested in Her Majesty as the sovereign head of each province. Sect. 126, which embraces provincial revenues other than those arising from

territorial sources, and includes all duties and revenues raised by the provinces in accordance with the provisions of the Act, is expressed in language which favours the right of the Crown, because it describes the interest of the provinces as a right of appropriation to the public service. And, seeing that the successive decisions of this Board, in the case of territorial revenues, are based upon the general recognition of Her Majesty's continued sovereignty under the Act of 1867, it appears to their Lordships that, so far as regards vesting in the Crown, the same consequences must follow in the case of provincial revenues which are not territorial.

Being of opinion that the decisions of both Courts below were sound, and agreeing with the reasons assigned by the learned judges, their Lordships will humbly advise Her Majesty to affirm the judgment appealed from, and to dismiss the appeal. The appellants must pay to the respondent his costs of this appeal.



MUSGRAVE v. PULIDO, (1879) 5 App. Cas. 102

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

The judgment of their Lordships was delivered by Sir MONTAGUE E. SMITH.

To an action of trespass brought against the appellant, Sir Anthony Musgrave, in the Supreme Court of Jamaica, for seizing and detaining at Kingston in Jamaica, a schooner called the 'Florence', of which the plaintiff was charterer, and which had, as alleged, put into the port of Kingston in distress and for repairs, the Appellant pleaded the following plea:—

'The Defendant, Sir Anthony Musgrave, by his attorney, comes and says that he ought not to be compelled to answer in this action, because he saith that at the time of the grievances alleged in the said declaration, and at the time of the commencement of this action, he was and still is Captain-General and Governor-in-Chief of the Island of Jamaica and its dependencies, and was and still is as such entitled to the privileges and exemptions appertaining to such office and to the holder thereof, and that the acts complained of in the said declaration were done by him as Governor of the said Island of Jamaica, and in the exercise of his reasonable

discretion as such, and as acts of state; and this the Defendant is ready to verify, wherefore he prays judgment if he ought to be compelled to answer in this action.'

The Plaintiff demurred to this plea, and the present appeal is from the judgment of the Supreme Court allowing the demurrer, and ordering the Appellant to answer further to the writ and declaration.

[That the plea was advisedly pleaded as a plea of privilege, in order to raise the question of the immunity of the appellant from being sued as Governor in the Courts of his Colony, is clear as a fact, not only from the form of the plea but also from the previous proceedings in the case; and the decision of the Court below was given for the plaintiff altogether upon the plea as a plea of privilege. The Attorney-General, for the appellant, whilst not giving up the plea as a plea of privilege, insisted that if it disclosed a good defence in substance to the action, a general judgment could be given for the appellant, and under protest from the respondent's counsel, he was allowed to argue the broader point.]

If the plea is to be regarded as a plea of privilege only, and as claiming immunity to the Governor from liability to be sued in the courts of the Colony, their Lordships think that it cannot, in that aspect of it, be sustained.

The dictum attributed to Lord Mansfield in *Fabrigas v. Mostyn*, (1770) 1 Cowp. 161, that 'the Governor of a colony is in the nature of a Viceroy, and therefore locally during his government no civil or criminal action will lie against him, the reason is, because upon process he would be subject to imprisonment,' was dissented from and declared to be without legal foundation in the judgment of the Lords of the Judicial Committee delivered by Lord Brougham in the case of *Hill v. Biggs*, (1841) 3 Moo. P. C. 465. In that appeal their Lordships were of opinion that the plea of the Lieutenant Governor of the Island of Trinidad to an action brought against him in the Civil Court of the island, claiming that whilst Lieutenant Governor he was not liable to be sued in that Court, could not be sustained. The action was for a private debt contracted by the Defendant in England before he became Governor, but the principle affirmed by the judgment is that the Governor of a colony, under the commission usually issued by the Crown, cannot claim, as a personal privilege, exemption from being sued in the Courts of the colony. The claim to such exemption is thus met:— 'If it be

said that the Governor of a colony is *quasi* Sovereign, the answer is, that he does not even represent the Sovereign generally, having only the functions delegated to him by the term of his commission, and being only the officer to execute the specific powers with which that commission clothes him.

The Defendant has sought to strengthen his claim of privilege by averring in his plea that the acts complained of were done by him 'as Governor' and as 'acts of state.' Their Lordships propose hereafter to consider the particular averments of this plea. It is enough here to say that it appears to them that if the Governor cannot claim exemption from being sued in the Courts of the colony in which he holds that office, as a personal privilege, simply from his being Governor, and is obliged to go further, his plea must then show by proper and sufficient averments that the acts complained of were acts of state policy within the limits of his commission, and were done by him as the servant of the Crown, so as to be, as they are sometimes shortly termed, acts of state. A plea, however, disclosing these facts would raise more than a question of personal exemption from being sued, and would afford an answer to the action, not only in the Courts of the colony, but in all Courts; and therefore it would seem to be a consequence of the decision in *Hill v. Bigge* that the question of personal privilege cannot practically arise, being merged in the larger one, whether the facts pleaded show that the acts complained of were really such acts of state as are not cognizable by any municipal Court.

In the case of *The Nabob of the Carnatic v. The East India Company*, (1798) 1 Ves. Jun. 388, Lord Thurlow said, that a plea pleaded in form to the jurisdiction of the Court, but which denied the jurisdiction of all Courts over the matter, was absurd; and that such a plea if it meant anything, was a plea in bar.

In their Lordships' view, therefore, this plea, if it can be supported, must be sustained on the ground mainly relied upon by the Attorney-General, viz., that it discloses in substance a defence to the action.

Before advertng to the sufficiency of the averments in this plea, it will be convenient to refer to some decisions in which the position of Governors of colonies has been considered. In the leading case of *Fabrigas v. Mostyn*, the action was brought against Mr. Mostyn, the Governor of Minorca, for imprisoning the Plaintiff, and removing him by force from that island. The Governor's

special plea of justification alleged, that he was invested with all the powers, civil and military, belonging to the government of the island, that the Plaintiff was guilty of a riot, and was endeavouring to raise a mutiny among the inhabitants, in breach of the peace, and that, in order to preserve the peace and government of the island, he was forced to banish the Plaintiff from it. It then averred that the acts complained of were necessary for this object, and were done without undue violence. Upon the trial the Governor failed to prove this plea, and the Plaintiff had a verdict. When the case came before the Court of Queen's Bench, upon a bill of exceptions to the ruling of the Judge, Lord Mansfield said his great difficulty had been, after two arguments, to be able clearly to comprehend what the question was that was meant seriously to be argued. It seems, however, that the liability of the Governor to be sued was raised, and very fully discussed, one ground of objection being that he could not be sued in England for an act done in a country beyond the seas, and upon this question Lord Mansfield declared that the action would, to use his own phrase, 'most emphatically' lie against the Governor. His judgment proceeds to shew, in a passage bearing materially on the point now under discussion, in what way a defence to such an action might be made. He says, 'If he has acted right according to the authority with which he is invested, he may lay it before the Court by way of plea, and the Court will exercise their judgment whether it is a sufficient justification or not. In this case, if the justification had been proved, the Court might have considered it a sufficient answer; and if the nature of the case would have allowed of it, might have adjudged that the raising a mutiny was a good ground for such a proceeding.'

In the case of *Cameron v. Kyte*, (1835) 3 Knapp 332, which came before this board on an appeal from the colony of Berbice, the question was, whether the Governor had authority to reduce a commission of 5 per cent. upon all sales in the colony, granted to an officer called the Vendue Master by the Dutch West India Company before the capitulation of the colony to the British Crown. It was urged that the Governor was the King's representative, exercising the general authority of the Crown, and, as such, had power to make the disputed reduction. It was, however, decided that the Governor did not hold the position or possess the authority sought to be attributed to him, and that the act in

question was beyond his powers. In the judgment of this Committee, delivered by Baron Parke, it is said:—

‘There being, therefore, no express authority from the Crown, the right to make such an order must, if it exist at all, be implied from the nature of the office of Governor. If a Governor had, by virtue of that appointment, the whole sovereignty of the colony delegated to him as a Viceroy, and represented the King in the government of that colony, there would be good reason to contend that an act of sovereignty done by him would be valid and obligatory upon the subject, living within his government, provided the act would be valid if done by the Sovereign himself, though such act might not be in conformity with the instructions which the Governor had received for the regulation of his own conduct. The breach of those instructions might well be contended on this supposition to be matter resting between the Sovereign and his deputy, rendering the latter liable to censure or punishment, but not affecting the validity of the act done. But if the Governor be an officer merely with a limited authority from the Crown, his assumption of an act of sovereign power, out of the limits of the authority so given to him, would be purely void, and the Courts of the colony over which he presided could not give it any legal effect. We think the office of Governor is of the latter description, for no authority or *dictum* has been cited before us to shew that a Governor can be considered as having delegation of the whole royal power in any colony, as between him and the subject, when it is not expressly given by his commission. And we are not aware that any commission to Colonial Governors conveys such an extensive authority.’

Again, it is said:—‘All that we decide is that the simple act of the Governor alone, unauthorized by his commission, and not proved to be expressly or impliedly authorized by any instructions, is not equivalent to such an act done by the Crown itself.’

In the well-known case of the action brought by Mr. Phillips against Mr. Eyre, the former Governor of Jamaica, for acts done by him, whilst he was Governor, in suppressing an insurrection in that colony, the question raised was, whether the Colonial Act of Indemnity was an answer to an action brought in England. That such an Act was thought to be necessary, and that it was alone relied on as a defence to the action, raises a strong presumption that it had been thought that the action might, but for this Act,

have been maintained. It is to be observed, however, that the facts of the rebellion and of its suppression were averred in the plea by way of introduction to the Act of Indemnity, and Mr. Justice Willes, in delivering the judgment of the Exchequer Chamber, after saying that the Court had discussed the validity of the defence upon the only question argued by counsel, viz., the effect of the Colonial Act, adds 'but we are not to be understood as thereby intimating that the plea might not be sustained upon more general grounds as shewing that the acts complained of were incident to the enforcement of martial law.' (L. R. 6 Q. B. 31.) It is to be noticed that the nature of those acts, and the occasion upon which they were committed, were shown by distinct averments in the plea.

It is apparent from these authorities that the Governor of a colony (in ordinary cases) cannot be regarded as a Viceroy; nor can it be assumed that he possesses general sovereign power. His authority is derived from his commission, and limited to the powers thereby expressly or impliedly entrusted to him. Let it be granted that, for acts of power done by a Governor under and within the limits of his commission, he is protected, because in doing them he is the servant of the Crown, and is exercising its sovereign authority; the like protection cannot be extended to acts which are wholly beyond the authority confided to him. Such acts, though the Governor may assume to do them as Governor, cannot be considered as done on behalf of the Crown, nor to be in any proper sense acts of state. When questions of this kind arise it must necessarily be within the province of Municipal Courts to determine the true character of the acts done by a Governor, though it may be that, when it is established that the particular act in question is really an act of state policy done under the authority of the Crown, the defence is complete, and the Courts can take no further cognizance of it. It is unnecessary, on this demurrer, to consider how far a Governor when acting within the limits of his authority, but mistakenly, is protected.

Two cases from Ireland were cited by the Defendant's counsel, in which the Irish Courts stayed proceedings in actions brought against the Lord Lieutenant of Ireland. In these cases the Lord Lieutenant appears to have been regarded as a Viceroy. In both the facts were brought before the Court, and in both it appeared that the acts complained of were political acts done by the Lord

Lieutenant in his official capacity, and were assumed to be within the limits of the authority delegated to him by the Crown. The Courts appear to have thought that under these circumstances no action would lie against the Lord Lieutenant in Ireland, and upon the facts brought to their notice it may well be that no action would have lain against him anywhere. (*Tandy v. Earl of Westmoreland*, (1792) 27 St. Tr. 1246, and *Luby v. Lord Wodehouse*, (1865) 17 Ir. C. L. R. 618.)

Several cases were cited during the argument of actions brought against the East India Company, and the Secretary of State for India, in which questions have arisen whether the acts of the Indian Government were or were not acts of sovereignty or state, and so beyond the cognizance of the Municipal Courts. The East India Company, though exercising (under limits) delegated sovereign power, was subject to the jurisdiction of the municipal courts in India, and it will be found from the decisions that many acts of the Indian Government, though in some sense they may be designated 'acts of state,' have been declared to be within the cognizance of those Courts. Thus in the *Rajah of Tanjore's Case*, (1859) 13 Moo. P. C. 22, the question to be decided was thus stated by Lord Kingsdown in giving the judgment of the Committee:— 'What is the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain of the dominion and property of a neighbouring state, an act not affecting to justify itself on grounds of municipal law, or was it in whole or in part a possession taken by the Crown under colour of legal title of the property of the late Rajah, in trust for those who by law might be entitled to it? If it were the latter, the defence set up, of course, has no foundation.' This Committee, in deciding the questions thus raised, held that the seizure was of the former character, and therefore not cognizable by a Municipal Court. The answer of the East India Company in that case did not rest on the simple assertion that the seizure was an act of state, but set out the circumstances under which the Rajah's property was taken. After referring to the treaties made with the Rajah, it averred that in entering into those treaties, and in treating the sovereignty and territories of Tanjore as lapsed to the East India Company in trust for the Crown, the Company acted in their public political capacity, and in exercise of the powers (referring at length to them) committed to them in trust for the Crown of

Great Britain, and that all the acts set forth in the answer 'were acts and matters of state'.

In the case of *Forester and others v. the Secretary of State for India*, L. R. Ind. App. Sup. Vol. p. 10, in which the judgment of this Committee was delivered on the 11th of May, 1872, a defence of the same nature as that in the last-mentioned case was set up; but the decision there was on this point against the Secretary of State. In this suit also the answer set out the facts which were relied on to shew that the action of the Government complained of was a political act of state.

As far as their Lordships are aware, it will be found that in all the suits brought against the Government of India, whether in this country or in India, the pleas and answers of the Government have shewn, with more or less particularity, the nature and character of the acts complained of, and the grounds on which, as being political acts of the sovereign power, they were not cognizable by the courts. (See the *Nabob of Carnatic v. East India Company*, (1791) 1 Ves. Jun. 388; *Ex-Rajah of Coorg v. East India Company*, (1860) 29 Beav. 300; *Rajah Salig Ram v. Secretary of State for India*, L. R. Ind. App. Sup. Vol. p. 119, in which judgment was given by this Committee on the 27th of August, 1872.)

None of these cases help the present plea. On the contrary, it appears from them not only that the facts were laid before the Courts, but that the Courts entertained jurisdiction to inquire into the nature of the acts complained of, and it was only when it was established that they bore the character of political acts of state that it was decided they could not take further cognizance of them. It is to be observed that the sovereign authority conferred upon the East India Company appears in Acts of Parliament, and therefore, without being pleaded, the Courts would have judicial notice of it.

Coming to the present plea, we find that, after stating that the Defendant was Captain-General and Governor-in-Chief of the Island of Jamaica, the only averments in it are, that the acts complained of were done by him as Governor of the island, and in the exercise of his reasonable discretion as such, and as acts of state. There is no attempt to show the occasion on which the seizure of the Plaintiff's ship was made, nor the grounds on which that seizure, which is not in itself of the nature of an act of state, became and was such an act. The plea does not aver, even gener-

ally, that the seizure was an act which the Defendant was empowered to do as Governor, nor even that it was an act of state. It would have been contended at the trial, if issue had been taken, that it would satisfy the averments of this plea to prove that the Defendant assumed to make the seizure as Governor, and assumed to do it as an act of state, without shewing that the act itself was an act of state properly so called, and was within the limits of his authority. It was said that the plea should be construed as requiring, by implication, proof of these matters; but having regard to its nature and form as a plea of privilege, this cannot properly be held to be its meaning. Their Lordships cannot but think it was designedly pleaded in its present shape. It was a preliminary plea intended to raise the question whether the Governor, if acting *de facto* as such, and doing an act that he assumed and deemed to be an act of state, could be called on to show in the Courts of the Colony that the seizure complained of was really an act of state, of the nature and class of those which, as Governor acting on behalf of the Crown, he had authority to do. The object of the plea plainly was to stop the Court from entering upon such an inquiry; but upon the construction now sought to be given to it, this object would, from the first, have been frustrated, if issue had been taken, for the Court must then have gone into the very inquiry which it was the manifest purpose of the plea to avert. It appears to their Lordships that the Plaintiff could not have safely taken issue on it. He would have been met at the trial by the objection that it was a plea of privilege, pleaded as a preliminary plea to the jurisdiction, and neither was, nor was intended to be, an answer to the action.

It was contended that, under 'The Supreme Court Procedure Law, 1872,' of the colony, which provides that defects in form shall be disregarded, and that on demurrer the Court shall give judgment according to the very right of the cause, the judgment should now be given for the Defendant; but their Lordships think, for the reasons above given, that upon this ambiguous and defective plea a proper and final judgment on the right of the cause cannot be pronounced.

In the result, their Lordships must humbly advise Her Majesty to affirm the judgment of the Court below, and with costs.

STATUTE OF WESTMINSTER, 1931

[22 GEO. 5. CH. 4]

An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930.

[11th December 1931.]

WHEREAS the delegates of His Majesty's Governments in the United Kingdom, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland, at Imperial Conferences holden at Westminster in the years of our Lord nineteen hundred and twenty-six and nineteen hundred and thirty did concur in making the declarations and resolutions set forth in the Reports of the said Conferences:

And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the ~~Crown is the symbol of the free~~ association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion:

And whereas it is necessary for the ratifying, confirming and establishing of certain of the said declarations and resolutions of the said Conferences that a law be made and enacted in due form by authority of the Parliament of the United Kingdom:

And whereas the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland have severally requested and consented to the submission of a measure to the Parliament

of the United Kingdom for making such provision with regard to the matters aforesaid as is hereafter in this Act contained:

Now, therefore, be it enacted by the King's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1. In this Act the expression 'Dominion' means any of the following Dominions, that is to say, the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, the Irish Free State and Newfoundland.

2.—(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

(2) No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

4. No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

5. [Powers of Dominion Parliaments in relation to merchant shipping. 57 & 58 Vict. c. 60.]

6. [Powers of Dominion Parliaments in relation to Courts of Admiralty. 53 & 54 Vict. c. 27.]

7.—(1) Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder.

(2) The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

(3) The powers conferred by this Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada or of any of the legislatures of the Provinces respectively.

8. Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

9.—(1) Nothing in this Act shall be deemed to authorize the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.

(2) Nothing in this Act shall be deemed to require the concurrence of the Parliament or Government of the Commonwealth of Australia in any law made by the Parliament of the United Kingdom with respect to any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia, in any case where it would have been in accordance with the constitutional practice existing before the commencement of this Act that the Parliament of the United Kingdom should make that law without such concurrence.

(3) In the application of this Act to the Commonwealth of Australia the request and consent referred to in section four shall mean the request and consent of the Parliament and Government of the Commonwealth.

10.—(1) None of the following sections of this Act, that is to say, sections two, three, four, five and six, shall extend to a Dominion to which this section applies as part of the law of that Dominion unless that section is adopted by the Parliament of the Dominion, and any Act of that Parliament adopting any section of this Act may provide that the adoption shall have effect either from the

commencement of this Act or from such later date as is specified in the adopting Act.

(2) The Parliament of any such Dominion as aforesaid may at any time revoke the adoption of any section referred to in subsection (1) of this section.

(3) The Dominions to which this section applies are the Commonwealth of Australia, the Dominion of New Zealand and Newfoundland.

11. Notwithstanding anything in the Interpretation Act, 1889, the expression 'Colony' shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion.

12. This Act may be cited as the Statute of Westminster, 1931.

INDEX

Absolute Discretion, 53, 142, 144, 217, 288.

Absolute Power of Crown, 37, 43, 52, 53, 58, 59.

Abuse, of military authority, 339.
of jurisdiction, 133, 340.

Act of Parliament, *see* Statutes.

Act of State, 295-8, 304-16, 323, 368, 439, 462-70.

Annexation an, 296, 297-8.

by Colonial Governor, 423, 462-7.

function of Courts in respect of, 295, 297, 298, 306, 309, 311, 467, 469.

definition of, 59, 295, 297, 315.

to Foreigner without the allegiance, 295-6, 314.

to Foreigner within the allegiance, 296, 312-16, 368.

by Foreign State, 296, 303.

to Foreign State, 59, 295, 304-10.

distinguished from Prerogative, 59, 295.

by prior authorization, 295-6, 309.

Servant of Crown may set up plea of, 295-6.

none between Crown and subject, 296, 310-12, 368.

indirect effect of, on subject, 296, 297-8, 303.

by subsequent ratification, 295-6, 309, 313-14, 439.

as defence to action of Tort, 124, 295-6, 310-16, 462-70.

Treaty, making of, an, 297, 298.

Administrative decisions, 144.

Administrative Justice, 134-44.

Admiralty, 14, 122, 310.

Air Council, 122.

Air Force Act, 336.

Allen, 283, 284, 285, 286, 287, 288 n., 289.

Act of State to, 59, 295-6, 312-16, 368.

Local allegiance of, 283, 289, 292-4, 315.

Naturalization of, 283, 284, 286-9.

Status and Rights of, 289, 314, 315.

Alliance, 283-94.

in Colonies, 407, 427.

Correlative to protection, 283, 293.

Local, 283, 289, 293, 315.

Oath of, 286, 289, 290.

in Irish Free State, 289.

Protectorates, not due from inhabitants of, 406.

in Mandated Territory, 405.

Statutes *prima facie* applicable only to persons owing, 415.

Allen, C. K., 10 n., 143.

American Constitution, 4, 413, 420, 421.

Amoveas manus, 230, 233, 235.

'Anderson, the resolution in,' 38, 39 n.

Annexation,

An Act of State, 296, 297-8.

British nationality acquired by reason of, 285.

Effect on debts owed by or to government, 297-8.

Indirect effects of, on British subjects, 296.

Anson, 272, 302.

Ante-nati, the, 284.

Appeal, in criminal matters, 398-400, 448-9.

Army and Navy,

Discipline of, 335, 336-9, 340, 343, 345, 346, 347.

Colonial forces, payment of, 421-2.

Army Council, 14, 122.

Attorney-General, 228.

sues on behalf of Crown, 232.

action against, for Declaration, 227, 265-70.

duty in respect of *Fiat*, 216.

can enter *Nolle prosequi*, 271-2, 274-5.

answers Petition of Right, 230.

quasi-judicial powers of, 58.

responsibility to Parliament, 58, 275.

and Vexatious Actions Act, 24.

Australia, 288 n., 411, 416, 417, 418, 421, 422, 446, 471, 472, 473, 474.

Bacon, 52.

Bacon's Abridgment, 401.

Bahamas, 410.

Barbados, 410.

Bermuda, 410.

Bias, 135, 136.

and *see* Judges.

Blackstone, 21, 97, 215-16, 234, 408, 436.

Board of Agriculture, 143.

Board of Education, 138, 188, 205.

Board of Trade, 11.

Board, Local Government, 27, 140, 199 et seq.

Bracton, 52, 172, 215, 221, 272, 278.

British Commonwealth of Nations, 471.

British Nationality,

acquisition of, 283-8.

loss of, 284, 285, 286, 287, 288.

Declaration of retention of, 285.

British North America Act, 1867,

Full powers of self-government under,
412, 450, 452, 460.

Effect on Crown, 459.

Unaffected by Statute of Westminster,
472.

Brooke's Abridgment, 248.

By-laws, 9, 13, 26-30.

Cabinet, 58.

Campbell and Rolfe, 369, 371, 382-3,
385, 394.

Canada, 260 et seq., 382, 394, 411, 412-
13, 416, 417, 418, 421, 422,
442 et seq., 449 et seq., 458 et
seq., 471, 472, 473.

Cape of Good Hope, 408.

Carr, C. T., 10 n.

Certiorari, writ of, 133, 134, 187, 193,
200, 389.

Object of, 134, 187, 188, 189.

no difference in principle between
prohibition and, 189.

to bodies other than Courts of
Justice, 188.

to Board of Education, 188.

to justices in respect of rate, 188.

to licensing justices, 188.

to poor law commissioners, 188.

Cession of Territory, 301-2.

Coke, 35, 50, 71, 75, 83, 85, 235, 236,
280, 283, 314.

Colonial Laws Validity Act, 1865,

Purpose of, 414.

Imposes test of repugnancy, 414, 416,
420, 436, 437, 441.

Makes this the only test, 414.

Constituent powers under, 416-18.

Repeal in respect of Dominions, 472.

Royal assent cannot make valid a
statute void by, 446.

Colonies,

Authority of Imperial Parliament
over, 414, 435, 436.

rarely exercised, 412.

Church of England in, 279.

Constitutions of:

how altered, 416-19.

no guaranteed rights, 421.

Irish Free State, 421.

surrender of, to Crown, 409.

in Federations:

Constitution an Imperial Act, 417.

rigidity of constitution, 417-19.

distribution of sovereignty in,
417, 421, 450, 452.

residuary powers in, 421.

central and local governments
in, both represent Crown, 422,
458 et seq.

local legislature in, not subor-
dinate to central, 460.

Prerogative in, 422, 458 et seq.

Dominions no longer termed, 474.

Executives of:

their mutual independence, 424.

in Dominions, responsible to legis-
lature, 409, 410-11, 457.

Governors of, 431 et seq., 462 et seq.
all directly represent Crown, 461.

representation not general, but
limited by commission, 422-3,

464, 465, 467.

powers of, 411-12.

necessary party to colonial legis-
lation, 437.

can be sued in or out of colony,
422, 463-4.

Act of State by, 423, 467.

Power to proclaim martial law, 382.

Legislatures of:

establishment of, 407, 408, 434-6.

competence of, 411-16.

extra-territorial legislation, 414-
16, 446.

conformity to:

natural justice, 414, 436.

English law, 414, 436.

Imperial statutes, 414, 416,
436, 446.

Colonial constitution, 417-19.

not delegates of Imperial Parlia-
ment, 412-13, 460.

power essentially sovereign, 412-
13, 436, 452.

constituent powers of, 416-19.

controlled by Imperial Parliament,
435-6.

not Courts, 71 n.

Prerogative in, 407.

in settled colonies, 407, 429, 435, 458.

in conquered colonies, 296-7, 408,
428-9.

in Federation, 422, 458 et seq.

Settled and conquered, 407-9.

settled colonies:

law in, 280-1, 409, 435.

Prerogative in, 408, 429, 435.

establishment of legislature in,
279, 407, 408, 434-6.

conquered colonies:

law in, 408, 427-8.

status of inhabitants in, 427.

rights of Englishmen in, 296, 427.

Prerogative in, 297, 408, 428-9.

establishment of legislature in,
408, 434.

its effects, 279, 408, 429, 434.

Commitment per speciale mandatum
domini regis, 38.

Committee on Ministers' Powers, *see* **Ministers' Powers**.
Common Law, reason of, 1, 2.
Compensation,
 for damage authorized by legislature, 139, 154, 160, 161, 162.
 for property requisitioned, 325-33.
 History of, 329.
 Petition of Right for, 218-19.
 Presumption in favour of, 4.
Comyns' Digest, 1, 215, 232, 240, 401.
Constable (police), 128, 131.
 Protection of, 128.
 Duty to obey sheriff, 353.
 Duty regarding breach of peace, 363, 364.
 Right to call for assistance, 353, 364-5.
Constitutional Conventions, in Dominions, 410-11.
Contempt, Power to commit for,
 of Court, 83, 94, 95, 133.
 of Houses of Parliament, 74, 76-7, 83-4, 90, 91, 92-6.
 where no cause shown, 74, 92-6.
 in colonies, 71 n., 168-9, 436.
Contract,
 Petition of Right in, 217-18, 231-41, 243, 260.
 Liability of servant of Crown for, 224, 257-8, 260-2, 264.
Corporations,
 Distinction between public authority and trading, 13, 26-30.
 Doctrine of *Ultra vires*, 125, 156.
 Liability of Public authority, 156-68.
 can only act through servants, 158.
Counsel, immunity of, 127, 208.
County Council, 26, 27, 132, 207, 210, 211, 212.
Courts,
 and Acts of State, 295, 297, 298, 306, 309, 311, 467, 469.
 attitude to Discretion, 131, 132-3, 135, 137-8, 198.
 independence of Executive, 126.
 tendency to oust jurisdiction of, 142-3.
 all are King's, 271.
 meaning and varieties of, 208-9.
 immunity of members of, 126, 168-70, 185, 208, 343, 344-5.
 contempt of Court, 133.
 relation to Parliament, 1-9.
 relation to Parliamentary privilege, 71-106.
 relation to Prerogative, 9, 32.
 subject to writ of Prohibition, 134, 187-92, 401-2.
 held as far as possible in public, 127.

control of Public Authorities, 124-214.
 subject's right of access to, 4, 24-5.
 control of Subordinate legislation, 9-13.
 of Admiralty, 7, 88.
 of Appeal, 13, 126.
 of Chancery, 139.
 of Common Law, 33, 71, 72, and *passim*.
 of Common Pleas, 95, 212, 276.
 of Constable and Marshal, 336.
 Courts-martial, 14, 336, 338, 339, 344, 347, 348, 396, 397, 400.
 Ecclesiastical, 88.
 of Exchequer, 39, 89.
 of Exchequer Chamber, 39.
 Foreign, 88.
 of High Commission, 33, 281.
 High Court of Justice, 127, 142.
 High Court of Parliament, 71, 71 n., 81.
 House of Commons, 71, 71 n., 78, 81, 87, 89, 95, 103.
 House of Lords, 71 n., 82, 88, 95, 105, 276.
 Inferior, 71, 81, 89, 128, 170.
 of King's Bench, 74, 93, 95, 102, 276.
 Military Court of Inquiry, 208.
 Military Courts, under martial law, 189, 370, 374, 379, 389, 390, 395, 396, 397, 398-404.
 Municipal Courts, 295, 297, 298-9, 300, 303, 305, 306, 309, 316-21.
 Privy Council, 9, 18, 23, 28, 33, 37, 59, 71, 74, 178, 329, 413, 420, 443, 444-5, 448-9.
 Prize Court, 7, 63.
 of Record, 89, 168, 169, 208.
 of Session, 11.
 of Star Chamber, 33, 34, 35, 53, 54, 59, 64, 66, 71, 132, 150, 151, 153, 273, 276.
 of summary jurisdiction, 14, 366.
 Superior Court, 76, 82, 94, 128, 170.
 Supreme Court of Judicature, 6.
 Supreme Court of a colony, 168.
 of wards, 51.
Cowel, 50-1.
Crown, the,
 Absolute power of, 37, 43, 52, 53, 58, 59.
 power with respect to Aliens, 144, 314-15.
 in Canadian Provinces, 459.
 in the Colonies, 421-4.
 conquered Colonies, 408, 428, 429.
 Crown Colonies, 409.

Crown, the (cont.):

- settled Colonies, 407-8, 434-6.
- Revenues in, 458, 461; and *see* Colonies.
- Commercial Contract, can bind itself by, 243.
- cannot contract unconditionally for money payment, 220.
- in Council, *see* Courts, Privy Council.
- cannot take cause out of Courts, 277.
- Demise of, 34, 58, 246.
- Dispensing power of, 33, 54, 55-7.
- disclosure of documents by, 216-17, 217 n., 228.
- as Mandatory Power, 405.
- in Dominions, 409.
- symbol of association of British Commonwealth of Nations, 471.
- Emergency, judge of, 39, 43, 44, 50, 53, 153.
- one throughout the Empire, 421-2, 424.
- cannot fetter future executive action, 220, 224-5, 242-4.
- servant responsible to, for exercise of executive discretion, 138.
- in Federations, 422.
- in Foreign affairs, 32, 37, 49, 54, 295-321; and *see* Act of State, Treaties, Prerogative, Foreign Sovereigns.
- Immunity from action, 32, 58, 124, 215, 232, 271, 422.
- Incidental advantages in litigation, 216-17.
- relation to law, 51, 220-1, 227-8, 278.
- Legislation by, 35, 36, 63-70.
- Limitation of actions by, 271.
- and Local authorities, 129-30.
- Natural and politic capacities of, 34, 58.
- must act through Officers, 95.
- Ordinary power of, 35, 52, 58.
- Overseas dominions of, 405-74; *see also* Colonies, Protectorates, Mandated Territories.
- in Parliament, *see* Parliament.
- Prerogative of, *see* Prerogative.
- Property of, exemption from taxation, 2.
- not distrainable, 32.
- in Colonies, 458, 461.
- control of Prosecutions by, 271-2, 274-5, 437.
- relation to Public authorities, 130.
- Remedies against, 215-70. *See also* Petition of Right, Declaration.
- Remedies open to, 271.
- Representative action against servant of, 250-1, 256, 257-8, 259.

Representatives of, in Colonies, *see* Colonies.

- Requisitioning power of, 323, 325-33.
- Residuary power of, 32, 33.
- Servant of, *see* Servants of the Crown.
- not liable for tort of Servant, 218, 221-3, 244-50.
- but regularly satisfies judgment against, 222.
- cannot shield, 126, 220.
- Service under, 219-20, 224, 241-2, 244, 418.
- personification of State, 34, 58.
- operation of Statute on rights of, 2, 3, 61-2, 323, 324, 332-3.
- can derive benefit from, 438.
- Suspending power of, 57.
- Taxation by, 32, 35, 36-7, 39-48, 50, 51, 53, 120-1, 153.
- not liable in Tort, 217, 218, 219, 220, 227, 228 n., 240, 245, 248.
- Treaty-making power of, 298-302, 310-12.
- War, powers in, 14 et seq., 34, 323-33; and *see* War.
- Wrong, cannot authorize, 124, 220, 296, 314.
- Crown Colonies, 409.**
 - Virtually governed from Colonial Office, 410.
 - No ministerial responsibility in, 410, 411.
 - Composition of legislature in, 411.
 - Legislation by Imperial Parliament for, 412.
 - Legislation by Orders in Council for, 408, 410.
 - Power of Crown to establish ecclesiastical jurisdiction in, 279-80.
- Crown and Justice, the, 271-82.**
- Crown Practice, 271.**
 - and *see* Habeas Corpus, Mandamus, Prohibition, Certiorari.
- Crown Proceedings Committee Report, 1927, 227, 228.**
- Customs Officials, 136.**
- Debate,**
 - Freedom of, 77, 91, 102, 108.
 - Publication of Reports of, 238.
 - by newspaper, 77, 105-15.
 - by members of parliament, 108, 114.
 - Comment on, by newspaper, 115.
- Declaration, 268.**
 - Action for, against Attorney-General, 227, 265-70.
 - where estate of Crown is indirectly affected, 266.

- proposed, in lieu of specific performance or injunction, 228.
 of right, 267.
 of war, 291, 298, 324.
Déclaration des Droits de l'Homme, 4.
Declaratory Judgment against Crown, 226, 228, 230, 234, 235, 237.
Defence of the Realm, 39, 40, 42, 47, 49, 325, 327, 330, 332.
Defence of the Realm Act, 1914, Delegated Legislation under, 9-10, 14-25.
 Requisitioning under, 323, 325-33.
Delegated Legislation, *see* Subordinate Legislation.
Denization, letters of, 283.
Détournement de Pouvoir, 138-9, 143.
Dicey, 1, 127, 130, 215, 336, 352, 370, 375, 414.
Diplomatic Immunities, 303.
Discovery of Documents, 216-17, 228.
Discretion, 53, 130, 131, 132, 133, 135, 136, 137, 138, 139, 142, 185-6, 198, 210, 238, 255, 352.
 Absolute, 53, 142, 144, 217, 287.
 bona fide exercise of, not interfered with, 133, 138, 142, 198.
 Executive, 144, 288.
 Judicial, 132, 196, 210.
Discretionary powers, 33, 35, 36, 130, 134, 135, 140, 160, 198, 338.
Dispensing power, 33, 54, 55-7.
 distinguished from Pardon, 56.
 Trading with the enemy, 324.
District Audit, 143.
Dominions, 405, 472.
 Definition of status, 409-11.
 as Mandatory Power, 405.
 ministerial responsibility in, 409, 411, 423.
 legal and political status of, 410-11.
 Imperial legislation for, 412.
 competence of legislature, 413 *et seq.*
 restrictions on, removed, 416.
 Constitutions of, 416-21.
 Governor-General of, 423-4.
 Elective legislature, 409.
 Legislation by Imperial Parliament at request of, 416.
 Naturalization in, 288.
Duty, *see* Ministerial, Quasi-Judicial, Judicial Duty.
East India Company, 279, 304 *et seq.*, 468.
Elections, judgment of Parliamentary, 72-4.
Emergency (or national danger), state of, 6, 39-54, 153, 325, 353, 365-7.
Erie Richards, 370, 375.
Esamein, 1.
Excess,
 of military authority, 339-40.
 of jurisdiction, 126, 129, 134, 135, 141, 187-92, 340.
Executive discretion, 144, 288.
Executive officer, 144.
Extraneous considerations, in exercise of discretion, 135, 137, 138, 139, 140, 198-9.
Flat, in petition of right, 216, 224, 225, 227, 228, 229, 239, 267.
FitzHerbert, 234, 235, 248.
Food Controller, 119-22.
Foreign affairs,
 The Crown and, 32, 37, 49, 54, 295-321.
 and *see* Act of State, Treaties, Prerogative, Foreign Sovereigns.
Foreign Sovereigns and States,
 Acts of Crown towards are Acts of State, 59, 295.
 Crown not bound by municipal law in relations with, 295.
 Acts of State by, 296, 303.
 Complaint by, of infringement of treaty, 299.
 Immune from jurisdiction of municipal courts, 316-21.
 effects of waiver of sovereignty, 320-1.
 Recognition of, 302-3, 316-21.
 certificate of Crown conclusive evidence of, 317 *et seq.*
 Vessels belonging to, 299.
 British subject serving under, 296.
Fortescue, 42, 64.
Freedom of debate, 77, 91, 102.
 from arrest, 77, 91.
 of the Press, 150-2.
 personal, right of, 4, 18, 21, 35, 37-9, 184-5.
Gardiner, 44, 48 *n.*
Gladstone, 302.
Glanvill, 272.
Government,
 Carried on by virtue of specific powers, 124.
 Distinction between property and, 48, 52, 53, 124.
 Special treatment for, 59-60.
 Comments on conduct of, 60, 113.
Government Departments, 9, 10, 140-1, 205, 225-6, 252, 253, 258-9, 268-9.
Governors, *see* Colonies, Governors of.

- Habeas Corpus**, 17, 19, 37, 38, 74, 75, 83, 84, 92, 95, 126, 132-3, 144, 146, 171, 178-84, 339, 389, 391, 392, 394, 403.
- Hakewill**, 49.
- Hale**, 220, 315, 383, 401.
- Hamilton, Alexander**, 302.
- Harcourt, Sir W.**, 302.
- Hawkins**, 148, 352, 355.
- Health, Minister of**, 12-13.
- Health, Ministry of**, 143.
- Heligoland**, 302.
- Holdsworth**, 53, 323, 370-1.
- House of Commons**,
 Whether a Court, 71, 71 n., 78, 81, 87, 89, 95, 103.
 Grand Inquest of nation, 81, 89, 90.
 Jurisdiction over matters arising with-
 in walls of, 77, 87, 96-105.
 in case of crime, 77, 101-2.
 Cannot make or declare law, 76, 102.
 Order of, acts done by, 79, 86, 88, 101, 108-9, 111.
 Privileges, sole judge of own, 72, 75, 76, 79, 98.
 no power to declare, 75, 76, 81.
 power to commit for contempt of,
 74, 77, 83-4, 91, 92-6.
 when no cause shown, 74, 92-6.
 Effect of Resolution of, 79-82, 88, 89, 96, 97, 99, 100, 102-4.
 Power to interpret statute, 99, 100.
 Not supreme power in State, 78.
- House of Lords**,
 a Court, 71 n., 82, 88, 95, 105, 276.
 Debate in, newspaper report of, 105-15.
 Jurisdiction over matters arising with-
 in walls of, 89.
 and Privileges of Commons, 73, 105.
 Effect of Resolution of, 82.
- Immunity**,
 of constable, 128.
 of coroner, 209.
 of Counsel, 127, 208.
 of Crown, 32, 58, 124, 215, 232, 271, 422.
 of customs official, 129.
 of diplomatic representative, 303.
 of foreign sovereign, 316-21.
 of inland revenue official, 129.
 of judge, 126, 168-70, 185, 208, 343, 344-5.
 of jurymen, 103, 127, 170-7, 343, 344-5.
 of justice of the peace, 129.
 of members of military court of in-
 quiry, 208.
 of members of parliament, 77, 90-1, 345.
 of ministers of the Crown, 345.
 of parties, 127, 208.
 of superior officer, 338, 339, 340, 341-8.
 of witness, 127, 208, 343.
- Impeachment**, 272.
- Imperial Parliament**,
 Sovereignty of, 411, 412, 414, 416, 435, 436, 452.
 not regularly exercised, 412.
 No territorial limitation on compe-
 tence of, 415.
- Imperial Conferences**, 423, 471.
- Imprisonment**, arbitrary, without trial,
 17, 37-9, 54, 178-85.
 and see Contempt, power to commit
 for, Internment.
- Indemnity, Act of**, 373, 374, 375, 391, 394, 397, 404, 431 et seq., 466-7.
- India**, 279, 288, 410, 469.
- Indirect rule**, 405.
- Industrial conscription**, 366.
- Infant**, 285, 287.
- Information**, 271.
- Injunction**, 139, 154, 155, 228.
- Inland Revenue Officials**, 129.
- Inquest of Office**, 271.
- Insurrections**, 391; and see Martial Law.
- International Law**, 7, 63, 295, 299, 303, 317, 368.
- Interest in litigation**, 1, 2, 135, 136, 144, 160, 193-4, 212, 237, 438.
- Internment**, 14 et seq.
- Interpretation of Statutes**, 2-4, 7, 17-21, 125, 154, 155, 158, 159, 166, 195, 452.
 by House of Commons, 99, 100.
- Invasion**, 283, 289, 293, 325, 382, 385.
- Ireland**, 367, 370, 376, 377, 383, 389 et seq., 398 et seq., 404, 423, 467-8.
- Irish Free State**, 178-9, 289, 381, 411, 419, 421, 471, 472.
- Jamaica**, 369, 429 et seq., 431, 462 et seq.
- James and Stephen**, 370.
- Jennings, W. L.**, 143.
- Judge in own cause, a man must not be**,
 1, 2, 135, 136, 160, 193-4, 212, 237, 438.
- Judges**,
 Bias, must be free from, 135.
 Immunity of, 126, 168-70, 185, 208, 343, 344-5.
 Interest, must not have, 1, 2, 135, 160, 193-4, 212, 237, 438.
 Questions to, practice of putting, 39, 449-57.

Sworn to execute justice according to law, 73, 276.
 Tenure of office, 126, 169.
 in Colonies, 169.
Judicial acts, duties, functions, 129, 130, 131, 132, 135, 137, 144, 168, 185-7, 188-90, 192, 193, 196, 197, 201, 205, 209-11.
Judicial control of Public Authorities, 124-214.
Judicial Discretion, 130, 132, 196, 210.
Judicial Officer, 133, 144.
 Ministerial Duty of, 133, 185-7.
Jurisdiction,
 abuse of, 139, 142.
 excess of, 126, 129, 134, 135, 142, 187-92, 340.
 not by superior courts, 126.
 immunity of judges when acting within, 126, 168-70.
 of military officer, 340.
 mistaken assumption of, 126, 213.
 refusal to exercise, 133, 138, 185-7.
 of courts, tendency to oust, 142-3.
Jury,
 Immunity of, 103, 127, 170-7, 343, 344-5.
 No longer witnesses, 171 n., 172.
 Trial by, 17, 19.
Justices of the Peace, 193-4, 198-9.
 Judicial and administrative functions of, 131-2, 211.
 Special protection of, 129.
 Subject to certiorari, 188.
 See also Magistrate.
Kennedy, W. P. M., 423.
Kenya, 407.
King, the,
 cannot arrest any man, 277.
 in Council, *see* Courts, Privy Council.
 Court, always present in, 276.
 Courts, all are King's Courts, 271.
 as Judge, 35, 40, 71, 272, 276.
 is fountain of justice, 33, 40, 41, 267, 271.
 Natural and politic capacities of, 34, 58.
 never dies, 34, 58, 246.
 in Parliament, *see* Parliament.
 title and authority independent of, 55.
 before, 43.
 Public and Private Capacities of, 58, 228, 231.
 Wrong, can do no, 32, 34, 38, 43, 47, 53, 60, 218, 219, 220, 221, 222, 296, 313.
 cannot authorize, 124, 220, 287, 296, 314; and *see* Crown, Prerogative.

Laaki, H. J., 125 n.
League of Nations, the, 405.
Legal maxims,
 Actio personalis moritur cum persona, 246.
 Ad quaestionem facti non respondent Iudices, ad quaestionem legis non respondent Juratores, 177.
 Audi alteram partem, 135, 140.
 Delegatus non potest delegare, 413.
 Deliberandum est diu, quod statuendum est semel, 64.
 Hoc solum rex non potest facere, quod non potest injuste agere, 221.
 Inter arma silent leges, 41.
 Judicium a non suo iudice datum nullius est momenti, 212.
 Jura naturae sunt immutabilia, et sunt leges legum, 2.
 King can do no wrong, the, 32, 34, 38, 43, 47, 53, 60, 218, 219, 220, 222, 296, 313.
 King is *justiciarius regni*, the, 38.
 King is *medicus regni*, the, 43.
 King never dies, the, 246.
 Law will rather suffer a private mischievousness, than a public inconvenience, the, 344.
 Man shall not be judge in his own cause, a, 1, 2, 135, 136, 160, 193-4, 212, 438.
 Nemo potest exuere patriam, 283.
 Nihil aliud potest rex in terris, cum sit Dei minister et vicarius, quam de jure potest, 221.
 Nullum tempus occurrit regi, 43.
 Omnis potestas à Deo, et non est potestas nisi pro bono, 52.
 People is the body, the King the head, the, 52.
 Parliamentum omnia potest, 1.
 Princeps et respublica ex justa causa possunt rem meam auferre, 325.
 Princeps legibus solutus, 34.
 Quae contra rationem juris introducta sunt, non debent trahi in consequentiam, 65.
 Qui facit per alium, facit per se, 163, 245.
 Qui juseu judicis aliquod fecerit, non videtur dolo malo fecisse, quia parere necesse est, 212.
 Quod necessitas cogit, defendit, 41, 383.
 Quod omnes tangit, per omnes debet supportari, 45.
 Quod Rex non debet esse sub homine, sed sub Deo et lege, 278.
 Regula juris lex est, quando quis aliquid alicui concedit, concedit et id sine quo ipse non potest, 45.

Legal maxims (cont.):

Rex censetur habere omnia jura in scrinio pectoris sui, 46.

Salus populi suprema lex, 6, 40, 331.

Summa ratio est quae pro religione facit, 3.

There is no wrong without a remedy, 103.

Ubi eadem ratio, ibi idem jus, 73.

Ubi jus, ibi remedium, 239.

Ubi non est lex, ibi non est transgressio, 64.

Legislation, 1-30.

by Private Bill, 8-9.

for foreigners, 7.

Subordinate, 1, 9-30.

Unparliamentary, 9, 32, 34, 35, 62-3, 64-70.

to implement treaty, 299, 300, 302.

Colonial, 411-21, 431-57.

See also Statutes, Proclamations, Regulations, Orders in Council, By-laws.

Legislature, see Parliament.

Lex et consuetudo Parliamenti, 71, 71 n., 72, 75, 82, 83, 97.

Littleton, 314.

Local authorities, 143.

Subordinate legislation by, 9, 13, 26-30.

Relations with Crown and Government Departments, 131, 143.

Local Government, 131-2, 139-40, 142.

Long Parliament, 48, 54, 59, 151, 300.

Lord Chancellor, 33, 126.

Lords of Appeal in Ordinary, 126.

Magistrate,

duty in respect of riot, 352, 361-4, 371.

duty in respect of unlawful assembly, 356-7, 358.

See also Justices of the Peace.

Maintenance of Order, 336, 352-67.

Maitland, 58, 131-2, 335.

Malaya, 405.

Malice,

and Act of Indemnity, 373, 375, 431.

in Defamation, 109, 110, 207-12.

of judge, 128, 168-70, 343.

of jurymen, 343.

of justice of the peace, 129-30.

of quasi-judicial officer, 129, 197, 207-12.

of servant of the Crown, 221.

of superior officer, 338, 340, 341-8.

of witness, 343.

Malta, 410.

Malum in se, malum prohibitum, 55, 56, 65-6.

Mandamus, writ of, 133, 134, 137, 188, 205, 271.

Mandated Territories, 405-6.

Manning, 232.

Manual of Military Law, 350.

Manwaring, 50-1.

Married woman, 287.

Martial Law, 189, 323, 335-6, 353, 368-404, 431, 442, 467.

Authorities for, 369-71.

Definition of, 368.

Different meanings of, 325.

In continental states, 336-7, 369.

Exercise of, forbidden by Petition of Right, 54, 323, 369, 371, 373, 389, 389 n.

Not in time of peace, 54, 371, 389, 389 n.

In time of war, 389 n., 393.

Whether recognized by Courts, 371, 373.

While courts are open, is justified by necessity, 383, 385, 393.

No law at all, 374, 383.

Prerogative to execute, 323, 374, 376, 377, 378-9, 382-3.

Matter of State, 35, 59, 71, 323.

See also Act of State.

Maxwell, 21.

Military Authorities (see also Soldier), acquisition of goods by, 10.

right of, to use force against force, 189, 371, 393, 395, 400.

validity of exercise of martial law by, not recognized by Courts, 372-3, 384.

cannot be interfered with during state of war, 373-4, 375, 376, 377, 393-4, 404.

liability for acts done in exercise of martial law, 373, 374, 375, 377, 387, 390, 393-4, 396, 397, 404.

Military Law, 335-51.

Entirely statutory, 323-4, 336.

Relation to law of the land, 336.

Military Service, Compulsory, 366.

Ministerial Duty, 130, 131, 133, 187, 197.

Ministerial Officer, 128, 131, 133, 134, 212-13, 352.

Ministerial Responsibility, 53, 58, 220, 269, 275.

in Dominions, 409, 410-11, 423.

in Irish Free State, 411.

Ministers' Powers, Committee on, 135-6, 137, 140, 141, 142, 143, 144.

Monstrans de droit, 217, 239, 240.

Montesquieu, 25.

Munitions, Minister of, 22, 24, 25, 122.

Natural and artificial reason, 278.

Natural-born British Subject, 283-4, 285, 287.

- Natural Equity**, 2.
Natural Justice, 94, 135, 200, 201, 202, 203.
 and **Legislation**, 414, 436.
 and **Retrospective legislation**, 439-41.
Naturalization,
 in United Kingdom, 283-9.
 Revocation of Certificate, 287-8.
 Renaturalization, 287.
 in Dominions, 288, 288 n.
 in foreign state, 286, 291, 292.
 in enemy state, 289, 290-2.
Necessity, effect of, 41, 43, 47, 51.
 State, 60, 153, 224.
 Crown sole judge of, 44.
Negligence,
 in exercise of statutory powers, 126, 156-68.
 in choosing servant, 245.
 of quasi-judicial officer, 130.
Newfoundland, 310 et seq., 416, 435, 471, 472, 474.
New South Wales, 414-15, 417-18, 421-2.
Newspaper,
 comment on parliamentary debate, 115.
 report of parliamentary debate, 77, 105-15.
 of proceedings in Courts, 106, 109, 110-14.
 of public meeting, 106.
New Zealand, 419, 471, 472, 474.
Nolle Prosequi, 271-2, 274-5.
Oath,
 of allegiance, 286, 289, 290.
 in Irish Free State, 289.
 judicial, 73, 276.
 parliamentary, 96, 98, 99.
 declaration in lieu of, 99-100.
Orders in Council, 9, 178.
 and Bahamas, Barbados, and Bermuda, 410.
 and Crown Colonies, 408, 410.
 and Prize Court, 62, 67-70.
 and Protectorates, 406.
Ordinary power of Crown, 35, 52, 58.
Overseas Dominions of Crown, 405-74.
 Classification of, 405-11.
Palestine, 405.
Pardon,
 Prerogative of, 272.
 and dispensation, 56.
Parliament,
 Component parts of, not sovereign, 76, 78-9.
 Consent of people, represents general, 47, 60, 125.
 as a Court, 71, 71 n., 81, 83, 208, 236.
 Relation to Courts, 1-9.
 Debate in, newspaper report of, 77, 105-15.
 comment on, 115.
 report by member of, 108, 114.
 standing orders regarding, 114-15.
 and Emergency regulations, 366.
 Expenditure, control of, 121, 123.
 Foreigners, power to legislate for, 7.
 Houses of, sole judges of own privileges, 71, 72, 75, 79, 83.
 of matters arising within own walls, 77, 83, 87, 98, 104.
 Intentions of, in construction of statutes, 2, 5, 17, 121, 154, 155, 203.
 Established to limit power of King, 42.
 Member of, exclusion from House, 96, 97, 101.
 privileges of, 77, 90.
 freedom of debate, 77, 91, 102.
 from arrest, 77, 91.
 Power of, unlimited, 1, 6, 76, 78.
 practical limitation on, 6.
 and Proclamation of Emergency, 365.
 and Property of subject, 40, 47, 52.
 Effect of Resolution of one House of, 82, 86.
 Sovereignty of, 1-9.
 Cannot bind subsequent Parliaments, 6.
 Ratification of Treaty by, 300, 302.
 and see **Legislation**, **Taxation**.
Parliamentary Papers, publication of, 80, 85, 92 n., 107-8, 111.
Parties, immunity of, 127.
 right to put forward case, 135, 140, 141, 194-7, 200, 201, 202, 205, 207, 268.
Peace, Order and Good Government of Colony, 412, 413, 416, 445-6.
Penal Statutes, 4, 17, 19, 55, 57.
Petition,
 as remedy against Crown, 215.
 of grace, 236, 249.
 to Barons of Exchequer, 237-40.
 of complaint, 239.
Petition of Right, 58, 216-20, 223, 224, 226, 227, 267, 325.
 Procedure in, 216, 229-31.
 History of, 217-19.
 for recovery of property, 217, 232, 233-4.
 for recovery of land, 233, 235, 236, 248.
 for recovery of chattels, 232, 233, 235, 247-8.
 for debt, 217-18, 232, 234, 239, 240, 260.

Petition of Right (cont.):

- for compensation, 218-19, 325.
- for unliquidated damages for breach of contract, 217-18, 231-41.
- not for tort, 217, 218, 219, 220, 240, 248.
- nor for tort of servant of crown, 217, 244-50.
- general remedy except for tort, 218-19, 223.
- only remedy where estate of Crown directly affected, 266, 267.

Petition of Right, 1628, 40, 44, 74.
and arbitrary imprisonment, 54.
and martial law, 54, 335, 371, 374, 389, 389 n.

Policy, 132, 224.

- and government, 46, 52.
- control of, 125, 139-40.

Polloek, 370, 375.

Posse Comitatus, 353.

Postmaster-General, 252-9.

Post-nati, the, 284.

Prerogative, the Royal, 31-70, 89, 95, 323.

- distinguished from Act of State, 59, 295.

to maintain discipline in Army, 335.
in the Colonies, *see* Colonies.

relation to Common Law, 31, 32, 59.

relation of Courts to, 9, 32, 53, 59, 139.
to establish new Courts, 272-3, 279, 280.

priority of Crown debts, 458 et seq.
relation to defence of the Realm, 45.
Definition of, 31.

Denization, to grant letters of, 283.

Dispensing Power, 33, 54, 55-7, 324.
Exercise of, uncontrollable by Courts, 53, 58.

Foreign affairs, in relation to, 32, 34, 37, 49, 58, 295 et seq.

- states, to recognize, 302-3, 316-21.
- trade, to control, 37, 48, 300.

Inseparable, 2, 36, 45, 51, 54, 55, 61.
relation of law to, 31, 59.

Legislation by, 9, 35, 36, 63, 70.

Limits of, a matter of Common Law, 31, 66, 74.

Litigation, 216-17, 227; and *see* Remedies against the Crown.

Martial Law, to execute, 54, 335, 373, 376, 377, 378, 379, 382, 383.

Medieval notion of, 32, 33.

Modern theory of, 31, 58-62.

of Pardon, 56, 272.

Privilege, analogy with parliamentary, 71, 74.

to requisition property, 323, 325-33.
rival theories of, 36.

relation to Statute, 2, 31, 36, 45, 51, 54, 55, 61-2, 323, 324, 332-3.

and rights of Subject, 50, 227, 267.

Suspending Power, 57.

Taxation by, 36-48.

Territory, to annex, 407.

to cede, 300-1.

Treaty, to bind nation by, 298, 299, 300, 302.

War and Peace, to make, 32, 43, 298, 324.

Prerogative writs, 74, 132 et seq., 139, 142, 271, 339.

and *see* Certiorari, Habeas Corpus, Mandamus, and Prohibition.

Press, history of freedom of, 150-2.

Privilege, in defamation, 77, 105-15, 129.

Privilege, Parliamentary, 71-105.

Contempt of, Commitment for, 74, 76, 77, 83-4, 90.

Courts can inquire into extent of, 81, 89, 97.

Two irreconcilable doctrines of, 76.

Exclusive jurisdiction of each House over, 71, 72, 75.

Heads of, 77.

Legal memory, need not date from, 90.

Limits a matter of Common Law, 74.

Nature and basis of, 90-1.

Personal privileges, 77, 90.

freedom of debate, 77, 91, 102.

immunity from civil arrest, 77, 91.

Statutory limitations of, 76.

Privy Council, *see* Courts.

Proclamations,

Legislation by, 9, 32, 34, 64-7.

Taxation by, 41.

of Emergency, 365.

of Martial Law, 376, 382, 384, 385, 389, 391, 400.

Effect of, 382.

in Protectorate, 408.

Prohibition, writ of, 389, 398.

Definition of, 401.

No difference in principle between *certiorari* and, 189.

Used to prevent excess of jurisdiction, 134, 187-92.

To whom issued, 402.

bodies other than Courts of Justice, 134, 188-9, 402.

Court-martial, 339, 347.

Inclosure Commissioners, 188.

Light Railway Commissioners, 188.

Military Court, 189, 398, 401, 403.

Tithe Commissioners, 188.

not available against legislative body, 134.

Property,

- of Crown, 2, 32.
- Distinction between government and, 46, 52, 53, 124.
- Petition of Right for recovery of, 217, 232, 233-4.
- in right to vote, 73, 74.
- security of, the end of society, 147.
- of subject, 40, 47, 50, 52, 203.

Prosecution,

- Control of, by Crown, 437.
- by *Nolle Prosequi*, 271, 274-5.
- In name of Crown, 271.
- Subject's right to initiate, 271, 275.

Protected States, 405.

Protectorates, 405, 406-7.

Public and Private Law, 46, 52, 53, 58-9, 130 n.

Public Authorities,

- By-laws of, 13, 26-30.
- Essential similarity to private persons, 160.
- Judicial control of, 6, 124-214.
- by Prerogative writs, 133 et seq.
- Protection of, 127, 213-14.

Public Local Inquiry, 141, 199-206.

Public Officer, 72, 73.

- Liability for neglect of duty, 363-4.

Public Utility Companies, 9, 13, 28-9.

Publicity in Justice, 127, 135.

- in Administrative decisions, 141.

Quarter Sessions, 204, 211.

Quasi-judicial duties, powers, functions, 58, 129, 135, 136, 137, 138, 140, 141, 144, 160, 197.

Quebec, 408.

Radcliffe and Miles, 128.

Regulations, 9-11, 14-21, 22-5, 119-22, 178, 323, 328, 401.

Remedies against the Crown, 215-70; and see Declaration; Petition of Right. Requisitioning, Power of, 10, 323, 325-33.

- History of, 330-2.

Respondent Superior, 161, 163, 222.

- and Crown, 161, 222-3.
- and other public authorities, 160, 164.

Responsible Gov. in Dominions, 410-11.

Retrospective Legislation, 4, 438-41.

Revenue, expenditure of, 121, 123.

Riot, 352, 354, 357-8, 363, 368, 432.

- duty of suppressing, 352-3, 359-64.

Riot Act, 362, 363.

Robson, 130, 135.

Rout, 352.

Royal Style and Titles, 471.

Rules Committee of Supreme Court, 9.

Secretary.

of State, 14-18, 28, 191, 285-8, 366.

General Warrant of, 145-54.

- for Home Affairs, 16, 144, 178, 179, 181, 182, 229.

for Colonies, 169.

for Scotland, 15, 204.

Séparation des Pouvoirs, 1, 132.

Servants of the Crown,

- Nature of Service, 219-20, 224.
- in colonies, 422.

Employed during pleasure of Crown, 219-20, 241-2, 244.

- unless terms otherwise settled by statute, 219-20, 242, 244.

Superior and subordinate are fellow-servants, 224, 254, 255, 256, 257.

Crown not liable for tort of, 218, 221-3, 244-50.

- proposed alteration of this rule, 228.

Crown regularly satisfies judgment against, 222.

Liability of,

- personally liable in tort, 124, 220-1, 223, 250-1, 254, 256, 313.

- but not in representative capacity, 250-1, 256, 257-8, 259.

- not liable for torts of subordinates, 60, 161, 224, 250-9.

- unless ordered by them, 251, 254, 259.

- not liable for contracts made on behalf of Crown, 224-5, 257-8, 260-2, 264.

- unless they have contracted personally, 261-2.

- not liable for breach of implied warranty of authority, 60, 224.

- not liable to third party for duty owed to Crown, 133, 225, 262-5.

- when plea of Act of State available to, 295-6.

Sheriff, 56, 352-3, 361.

Ship-money, 39-48, 153.

Short and Mellor, 181, 401.

Smith, H. A., 421 n.

Soldier,

- Terms of service of, 219, 228.

Legal status of, 336-40.

- remains a citizen, 336, 340, 353, 360.

- subjected to special code of law, 338.

- enforcement of purely military rights, 338.

- special mode of redress, 338, 345, 346-7, 348.

- military offences of, 337, 339.

- other offences of, 337.

- Soldier** (*cont.*):
- Superior officer,
 - acts of, in excess of authority, 339.
 - malicious acts of, 338, 339, 340, 341-8, 385.
 - orders of, 136, 340, 348-51, 374, 376, 377.
 - Duty of, in case of riot, 353, 360-1.
 - South Africa**, 278 et seq., 292-4, 296, 304 et seq., 370, 411, 419, 421, 446, 471, 472.
 - Southern Rhodesia**, 410.
 - South-West Africa**, 405.
 - Sovereignty of Parliament**, 1-9.
 - Specific Performance**, 228.
 - Spheres of Influence**, 405.
 - State**,
 - law of, 153.
 - reason of, 153.
 - Crown personification of, 34, 58.
 - See also* Act of State, Matter of State.
 - State necessity**, 60, 153, 224.
 - State offences**, 60, 153, 224.
 - Statelessness**, 288 n.
 - Statutes**,
 - Benevolent interpretation of, in favour of Executive, 6, 416.
 - Common Law, control of, 1, 2, 3.
 - Corporations incorporated by, 125, 156 et seq.
 - effecting constitutional changes, 5, 17.
 - Courts, jurisdiction of, and, 6.
 - right to protection of, and, 4, 24-5.
 - affecting Crown, 2, 3.
 - affecting foreigners out of the jurisdiction, 7, 416.
 - Imperative, 154-6.
 - Interpretation of, 2-4, 7, 17-21, 99, 100, 121, 125, 154, 155, 158, 159, 166, 195, 203, 452.
 - Necessity, must give way to, 51.
 - Parliament, construction according to intention of, 2, 5, 17, 121, 154, 155, 203.
 - cannot bind subsequent, 6.
 - Penal, 4, 17, 19, 55, 57.
 - Permissive, 154-6.
 - and personal freedom, 4, 18, 21, 185.
 - Private Acts, 8.
 - Public Acts, 8.
 - Publication of, 13.
 - Repeal of, by implication, 21.
 - Retrospective, 4, 438-41.
 - Taxing, 4.
 - Text of, if explicit, conclusive, 2, 452.
 - affecting vested rights, 4, 17.
 - necessary validity of, 452.
 - Statutory powers**,
 - Relation to Prerogative, 61-2, 323, 324, 332-3.
 - Staunford**, 215, 235, 247-8.
 - Stephan**, 350, 398.
 - Story**, 161.
 - Strike, right to**, 366.
 - Subject, the**,
 - no Act of State between Crown and, 296, 310-12, 368.
 - indirect effect of, on, 296, 297-8, 303.
 - Common Law rights of, 4.
 - Courts, right of access to, 4, 22-5.
 - Duty, in case of riot, 352, 360, 362.
 - to assist constable, 353, 364-5.
 - Force, right to use force against, 101, 189, 371.
 - Laws, birthright in, 50, 409.
 - Liberty of, 4, 18, 21-2, 35, 37-9, 184-5.
 - Presumption in favour of, 125.
 - Property of, 22, 40, 47, 50, 52, 72, 73, 74, 203.
 - Subordinate Legislation**, 1, 9-30.
 - Varieties of, 9.
 - Doctrine of *ultra vires*, 9-13, 14, 23, 24, 179, 187.
 - 'to take effect as though contained in the statute,' 11-13, 143.
 - Publication of, 13.
 - See also* Proclamations, Regulations, Orders in Council, By-laws.
 - Suspending Power**, 57.
 - Tanganyika**, 405.
 - Taxation**, 117-23.
 - in conquered colony, 408, 425-31.
 - construction of statutes relating to, 4, 121-2.
 - House of Commons, exclusive control over, 118.
 - Property, an interference with, 147.
 - by Resolution of Committee of Ways and Means, 117-18.
 - in settled colony, 407, 429.
 - Statute, must be authorized by, 32, 117, 119-23.
 - Treaty involving, 299, 300, 302.
 - Unparliamentary, 35, 36-7, 39-48, 50, 51, 53, 120-1, 153.
 - Taxing Statutes**, 4.
 - Throne, Succession to the**, 471.
 - Tort**,
 - Act of State as defence to action of, 124, 295-6, 310-16, 462-70.
 - Crown not liable in, 217, 245.
 - Nor for tort of servant of Crown, 218, 221-3, 244-50.
 - proposed alteration of these rules, 228.
 - Servants of Crown personally liable in, 220-1, 223, 250-1, 254, 256.
 - but not in representative capacity, 250-1, 256, 259.

Liability of Servant of Crown for tort
of subordinate, 60, 251, 254,
259.

Other public authorities liable for
servants' torts, 60, 160, 164.

Trading with enemy, 323, 324.

Transport, Minister of, 187, 190.

Traverse of office, 217, 236, 239.

Treason, 51, 394.
by naturalization in enemy state,
289, 290-2.
by resident alien, 289, 292-4.

Treaties, 298-302.
Are Acts of State, 298.
Crown has full power of making, 298,
312.
but cannot perform treaty obliga-
tions by way of legislation or
taxation, 299.

Modus vivendi, 311.

Obligations arising from, cannot be
enforced in municipal courts,
298.

Parliamentary ratification of, 300-2.
for peace, or for preservation of peace,
300, 312.
for cession of territory, 301-2.

Trustees,
Public authorities are, of public
money, 140.

Ultra vires, doctrine of,
and Acts of Parliament, 7.
and subordinate legislation, 9-13, 14,
23, 24, 179, 187.
and by-laws, 26, 29.
and corporations, 125, 156.

United States, 4, 385, 415, 420.

Unlawful assembly, 170, 171, 352, 354-9.

Vested Rights,
presumption in favour of, 4, 17, 125.

Vicarious liability, 222-3.

Victoria, 420.

Vote, right to, 5-6, 72-4.

War,
Articles of, 208, 337, 345, 346, 348.
Crown, powers of, in, 34, 323-33.
under D.O.R.A., 14 et seq.
Declaration of, effect of, 291, 324.
an act of state, 324.
and powers of Executive, 10.
and Liberty of subject, 21-2.
Prerogative to declare, 32, 43, 298,
324.
and Property of subject, 22, 325.
State of, as basis of martial law, 372,
393, 400.
Courts are judges of existence of,
373, 376, 384.
definition of, 380.
ousts jurisdiction of Courts, 372,
384, 389, 393, 396, 397, 398,
404.
session of Courts during, 372, 383-
9, 394, 395.

Warrants,
for search of stolen goods, 146, 148,
149.
general, 145-54.
Search, issued by Star Chamber,
150-1, 153.
and constables, 128, 213.

Warranty of authority, breach of im-
plied, 60, 224.

Ways and Means, Committee of, 117.

Westminster, Statute of, 411, 416, 418,
419, 423, 471 et seq.

Whitelocke, 52.

Witness, Immunity of, 127, 208, 343.

Writ, de contumace capiendo, 180.
rege inconsulto, 59, 72.
of extent, 271.
of ship-money, 39 et seq.
See also Habeas Corpus, Mandamus,
Prohibition, Certiorari.

Yorke and Talbot, 300 n.

Yorke and Wearge, 429, 431.

Zanzibar, 405.

